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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1940

## No. 377

HIRAM R. EDWARDS, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 26, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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INDEX.



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 5, 1940.

[fol. a] [Caption omitted]

[fol. 1]

**IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT**

No. 2078

HIRAM R. EDWARDS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

**Statement of Points Relied On and Designation of Parts of Record to be Printed**—Filed March 16, 1940

To the Honorable, the Clerk of the Tenth Circuit Court of Appeals of the United States of America:

In accordance with, and pursuant to, Rule 13 of the Rules of this Court, adopted and made effective May 25, 1939, Appellant files and submits herewith his definite statement of the points on which he intends to rely and of the parts of the record which he thinks necessary for the consideration thereof, with proof of the service of the same on Appellee.

POINTS ON WHICH APPELLANT INTENDS TO RELY

I

That the Court erred in overruling the Demurrer to the Indictment and as to each count thereof, for the reasons therein stated, viz.:

(a) That said indictment wholly fails to charge said defendant with a violation of any valid law or statute under the Constitution of the United States of America.

(b) That said Indictment is not signed by the foreman of the Grand Jury for the Western District of Oklahoma purporting to have returned said purported Indictment.

(c) That said Indictment and each and every count thereof, except the Eleventh count, is fatally defective for duplicity, in that the same alleges and sets forth in each of the first ten counts thereof divers and sundry different or-

ganizations, companies, trusts and schemes wholly disassociated from each other.

(d) That said Indictment, and each count thereof, except [fol. 2] count Eleven thereof, is fatally defective for the reason that the allegations contained in the first count of said Indictment pertaining to the representations and statements made and to be made by the defendants are not properly negatived, said allegations being incorporated by reference in the other counts of said indictment.

(e) That Count 3 of the Indictment, which attempts to allege a violation of Section 17 (a) of the Securities Act of 1933, i. e., the sale of Securities by the use of the mails by means of omissions to state material facts necessary to be stated to make the statements made, in the light of the circumstances under which they were made, not misleading; is defective and the same should be quashed for the reason that the same is made up entirely of conclusions of the pleader and the defendant is not apprised of any fact or facts upon which to base his defense with respect to the allegations to the effect that various omissions were made of material facts, said count of the Indictment wholly failing to state wherein the omissions complained of were material and what the circumstances were under which such omissions were made.

(f) That Counts 4 and 5 of the Indictment were defective and fail to state a cause of action or charge of a violation of any laws of the United States of America. In this connection said counts attempt to charge a violation of Section 5 (a) (1) of the Securities Act of 1933, in substance to the effect that said defendants used the United States mail in the sale of certain securities without having in effect a registration statement filed with the Securities and Exchange Commission, neither of said counts alleging that the securities so sold by said defendants were not in the class of securities exempted from registration under Section 3 of the Securities Act of 1933 and the Rules and Regulations of the Securities and Exchange Commission exempting various classes of securities as provided for by Section 3 (b) of said Securities Act of 1933.

(g) That Counts 6, 7, 8, 9 and 10 of the Indictment wholly fail to state a cause of action or charge of a violation of any valid and existing statute of the United States by or against

said defendant, said counts attempting to charge a violation of Section 338, Title 18, United States Code.

(h) That Count 11 of said Indictment, to-wit: a charge of conspiracy, fails to properly state a cause of action against [fol. 3] or charge of a violation of law by this defendant, and is defective in that said count charges the defendants with a conspiracy to violate the Securities Act of 1933 "by selling said securities by use of the United States mails without having in effect a registration statement, filed with the Securities and Exchange Commission", said count wholly failing to charge that the securities so sold were not of the class of securities exempted from registration under Section 3 of the Securities Act of 1933 and the Rules and Regulations of the Securities and Exchange Commission promulgated under said Act exempting divers and sundry other classes of securities from registration.

II

That the Court erred in overruling appellant's plea in bar to the prosecution and in refusing to hear testimony and evidence in support thereof and in refusing to compel the Government to produce a transcript of the proceedings before the Securities and Exchange Commission in which defendant (appellant) testified under oath, pursuant to subpoena and under compulsion, and after having claimed his immunity against self-incrimination, for the reasons stated in defendant's said plea in bar and motion.

III

That the judgment of the Court is contrary to law.

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PARTS OF THE RECORD APPELLANT THINKS NECESSARY

1. Indictment.
2. Demurrer to Indictment.
3. Plea in Bar of defendant (Appellant) Edwards and application for production of transcript of evidence.
4. Motion of Government to strike plea in bar and objection to production of transcript of evidence.
5. Opposing affidavit of Government to plea in bar and application for production of transcript of evidence.
6. Motion of defendant (Appellant) Edwards to strike opposing affidavit in plea in bar.

7. Orders and Minutes of the Court in connection with the following:

[fol. 4] (a) Demurrer to Indictment.

(b) Plea in bar of defendant and application for production of transcript of evidence.

(c) Motion of Government to strike plea in bar.

(d) Opposing affidavit of Government.

(e) Motion to strike opposing affidavit.

8. Plea of Not Guilty of defendant (Appellant) Hiram R. Edwards.

9. Plea of Nolo Contendere of Hiram R. Edwards.

10. Order of Dismissal of said cause as to defendant, R. B. Binger.

11. Sentence and Judgment of the Court.

12. Notice of Appeal under Rule III.

13. Assignment of Errors.

Respectfully submitted, J. Forrest McCutcheon, 800 Perrine Building, Oklahoma City, Oklahoma, Attorney for Appellant, Hiram R. Edwards.

Service of the foregoing accepted and acknowledged this 15th day of March, 1940.

Chas. E. Dierker, by Asst. John Brett, United States Attorney for the Western District *for* Oklahoma.

[File endorsement omitted.]

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[fol. 5] [Caption omitted]

IN DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 12682. Criminal

UNITED STATES OF AMERICA, Plaintiff,

vs.

HIRAM R. EDWARDS, Defendant

INDICTMENT—Filed November 15, 1938

Violation:

Section 77, e and q, Title 15, U. S. C. A.
Section 338, Title 18, U. S. C. A.
Section 88, Title 18, U. S. C. A.

At the January, 1938 Term of the District Court of the United States for the Western District of Oklahoma, begun

and held at the city of Oklahoma City, Oklahoma, in said District, on the first Monday of January in the year of our Lord one thousand nine hundred thirty-eight the Grand Jurors of the United States of America, within and for said District, having been duly summoned, impaneled, sworn, and charged to inquire into and true presentment make of all public offenses against the laws of the United States of America, committed within said District in said State of Oklahoma, upon their oaths aforesaid, in the name and by the authority of the United States of America, do find and present:

1. That before and at the several times of the committing of the several offenses in this indictment hereinafter mentioned, Hiram R. Edwards and R. B. Binger, whose more full, true and correct names are to the Grand Jurors unknown, hereinafter called defendants, each of them then and there well knowing the facts in this indictment set forth, on and after the 1st day of May, 1936, unlawfully, wilfully, [fol.6] knowingly and feloniously, in the sale of certain securities, hereinafter described, by use of the United States mails, did employ and intend to employ a device, scheme and artifice to defraud Harper L. Proctor, Harvey K. Rose, E. H. McKibben, Willard W. Penry, W. E. Mitchell, R. H. Stewart, Holley B. Osmun, Jessie B. DeLaMater, Cash S. Clayton, J. B. Felty, D. M. Soules, Christine Baier, John Ferber, L. B. Shaw, Matthew Collina, Frank W. Boyd, Mrs. S. A. Rowland, Stephen L. Coffin, E. S. Curtis, Joseph Eklund, Leo Adams, I. N. Munson, Walter Schoonmaker, Hardin Williams, and divers and sundry other persons to your Grand Jurors unknown and too numerous to mention herein, said persons being hereinafter referred to as the persons to be defrauded, that is to say from the numerous classes of persons who could be induced to invest their monies and property in the securities to be sold by said defendants; said scheme, artifice and device to defraud the persons to be defrauded being in substance and effect as follows:

2. That on or about the first day of May, 1936, the defendants organized, controlled and created a business trust under the laws of the State of Oklahoma known and referred to as H. R. Edwards Comanche County, Oklahoma, Trust, and also at some times referred to as the Lucky Indian; the defendant Hiram R. Edwards was designated as sole trus-

tee of said trust and as such trustee was vested with title to an undivided one-half interest in an oil and gas lease covering the N/2 of the NE/4 of Section 32, Twp. 2N., Range 10W, in Comanche County, Oklahoma; said trust was capitalized at eight hundred units with a stated or par value of $10.00 per unit.

3. That as a further part of said scheme, artifice and device to defraud and on or about the 11th day of September, 1936, said defendants organized, controlled and created a business trust under the laws of the State of Oklahoma known and referred to as Edwards Indian Chief Trust; the defendant Hiram R. Edwards was designated as sole trustee of said trust and as such trustee was vested with title to an undivided one-half interest in oil and gas leases covering the W/2 of the SE/4 of Section 25, Twp. 2N, Range 9W, and SE/4 of the SW/4 of the SE/4 and the W/2 of the SW/4 of the SE/4 of Section 30, Twp. 2N, Range 8W, and the E/2 of the NW/4 and the SE/4 of the NE/4 and the NW/4 of the SW/4 of Section 31, Twp. 2N, Range 8W, and the W/2 of the NW/4 of Section 5, Twp. 1N, Range 8W and [fol. 7] the NE/4 of the NW/4 of Section 6, Twp. 1N, Range 8W, and the NW/4 of the NE/4 and the SE/4 of the NE/4 and the W/2 of the NE/4 of the NE/4 and the SE/4 of the NE/4 of the NE/4 of Section 1, Twp. 1N, Range 9W, in Stephens County, Oklahoma; said trust was capitalized at fifteen hundred beneficial interests with a stated or par value of $10.00 each.

4. That as a further part of said scheme, artifice and device to defraud and on or about the 25th day of November, 1936, said defendants organized, controlled and created a business trust under the laws of the State of Oklahoma known and referred to as Indian Chief Additional Development Trust; the defendant Hiram R. Edwards was designated as sole trustee of said trust and as such trustee was vested with title to an undivided one-half interest in the oil and gas leases described *about* in the last succeeding paragraph pertaining to Edwards Indian Chief Trust, said leases being located in Stephens County, Oklahoma; said trust was capitalized at fifteen hundred beneficial interests with a stated or par value of $10.00 each.

5. That as a further part of said scheme, artifice and device to defraud and on or about the 30th day of January, 1937,

said defendants organized, controlled and created a business trust under the laws of the State of Oklahoma known and referred to as Indian Chief Protection Lease Trust; the defendant Hiram R. Edwards was designated as sole trustee of said trust and as such trustee was vested with title to oil and gas leases covering the N/2 of the E/2 of the NE/4 of Section 25, Twp. 2N, Range 9W, and the NE/4 of the SE/4 and the E/2 of the NW/4 of the SE/4 of Section 2, Twp. 1N, Range 9W, and the E/2 of the SW/4 of Section 24, Twp. 2N, Range 9W, and the E/2 of the SE/4 of Section 26, Twp. 2N, Range 9W, and the W/2 of the SW/4 of the NE/4 of Section 1, Twp. 1N, Range 9W, and the E/2 of the SE/4 of Section 23, Twp. 2N, Range 9W, and the NW/4 of the NW/4 of Section 31, Twp. 2N, Range 8W, in Stephens County, Oklahoma; said trust was capitalized at two thousand beneficial interests with a stated or par value of $10.00 each.

6. That as a further part of said scheme, artifice and device to defraud and on or about the 6th day of May, 1937, the defendants organized, controlled and created a business trust under the laws of the State of Oklahoma known and referred to as Edwards Combined Trust; that the defendant [fol. 8] Hiram R. Edwards was designated as sole trustee of said trust and as such trustee was vested with title to an undivided eleven-sixteenths interest in an oil and gas lease covering twenty acres of land out of the Lewis Knight Survey, Abstract No. 324, in Jack County, Texas; said trust was capitalized at five thousand three hundred beneficial interests having a stated or par value of $5.00 each.

7. That as a further part of said scheme, artifice and device to defraud, said defendants for the purpose and with the intent of selling to the persons to be defrauded certain securities, to-wit, units or certificates of beneficial interest in the trusts above described, would and did send to said persons to be defrauded by use of the United States mails, various letters, pamphlets, and circulars in which false, fraudulent and misleading representations and statements were made and repeated, a portion of said false, fraudulent and misleading representations and statements being of the following tenor:

(a) On and after the 24th day of June, 1936, said defendants represented and stated to the persons to be defrauded that a 200-barrel per day oil well had been completed on a

nearby lease referred to as the English Lease, and that said well proved that commercial production would be found on the Lucky Indian lease, title to an undivided one-half interest in which was vested in H. R. Edwards Comanche County, Oklahoma, Trust, whereas, in truth and in fact, as said defendants, and each of them, then and there well knew, said well referred to as having been completed on the English Lease had not been completed as a 200-barrel per day well, but had been completed on or about January 1, 1936, as approximately a 100-barrel per day well, and the production of said well had decreased to less than thirty barrels per day by June 24, 1936, and that said well did not prove that the Lucky Indian lease would produce either oil or gas in commercial quantities; that the Lucky Indian Lease was already proven for commercial production, whereas in truth and in fact, as the defendants, and each of them, then and there well knew, said lease was not proved for commercial production; that said H. R. Edwards Commanche County, Oklahoma, Trust owned a one-half interest in three oil producing wells which had been drilled upon said Lucky Indian lease, whereas, in trust and in fact, as the defendants and each of them, then [fol. 9] and there well knew, said Trust did not own said wells and said wells were not producing oil or gas.

(b) On and after September 15, 1936, said defendants represented and stated to the persons to be defrauded that the well which had been drilled on the lease, title to an undivided one-half interest in which was vested in said H. R. Edwards Comanche County, Oklahoma, Trust was a good, commercial gas well, whereas in truth and in fact, as the defendants and each of them then and there well knew, said well had not encountered and was not capable of producing gas in commercial quantities.

(c) On and after October 6, 1936, said defendants represented and stated to the persons to be defrauded that the well which had been drilled to a depth of about 980 feet on the oil and gas lease, title to an undivided one-half interest in which was vested in the H. R. Edwards Comanche County, Oklahoma, Trust, had discovered oil in commercial quantities and that because of such discovery, the persons who had theretofore acquired units or certificates of beneficial interest in said Trust on the basis of the agreed down payment of $5.00 per unit at the date of purchase, and an additional payment of $5.00 per unit to be paid at the time oil was dis-

covered under said lease in commercial quantities, should remit to said defendants the balance of $5.00 per unit, whereas in truth and in fact, as the defendants, and each of them, then and there well knew, said well had not found either oil or gas in commercial quantities.

(d) On and after the 7th day of December, 1936, said defendants represented and stated to the persons to be defrauded that the well which had been drilled on the lease, title to an undivided one-half interest in which was vested in the H. R. Edwards Comanche County, Oklahoma, Trust was a nice well, and that they had bailed almost pure oil from the hole mixed with a little mud, whereas in truth and in fact, as said defendants, and each of them, then and there well knew, said well had not encountered either oil or gas in commercial quantities, and the fluid which had been bailed from the hole consisted of about three barrels of oil to 100 barrels of water.

(e) On and after August 13, 1936, said defendants represented and stated to the persons to be defrauded that Edwards Indian Chief Trust owned a block of leases covering 500 acres, the leases in which block were contiguous to the [fol. 10] tract upon which said defendants were then drilling a well, whereas in truth and in fact, as the defendants and each of them then and there well knew, said leases were scattered over six sections of land and were not contiguous to the lease upon which said well was being drilled.

(f) On and after August 26, 1936, said defendants represented and stated to the persons to be defrauded that the leases, title to an undivided one-half interest in which was vested in the Edwards Indian Chief Trust, were proven for the production of oil and gas, whereas in truth and in fact as the defendants, and each of them, then and there well knew, said leases were not proven for the production of either oil or gas; that said oil and gas leases were surrounded on three sides by close up producing wells and that a 7000 feet test, "jam up against" said leases had encountered commercial production, whereas in truth and in fact, as the said defendants, and each of them, then and there well knew, there was no commercial oil or gas production close to said leases, and the 7000 foot test was more than a mile and one-half from the well which said defendants were drilling upon said leases.

(h) On and after December 1, 1936, said defendants represented and stated to the persons to be defrauded that the funds to be realized from the sale of units in Indian Chief Additional Development Trust were needed for and would be used to defray the expense of making a Schlumberger test in the well which had been drilled on the lease, title to an undivided one-half interest in which was vested in Edwards Indian Chief Trust, and to drill an additional well on said lease, whereas in truth and in fact, as the defendants, and each of them then and there well knew, said funds would not be and were not used for the purpose of making a Schlumberger test or for drilling an additional well, and no such test was made and no such additional well was drilled; that a Halliburton test had been made on said well which indicated that said well had encountered commercial production at a depth of about 2500 feet, whereas in truth and in fact, as said defendants and each of them then and there well knew, said Halliburton test did not indicate the presence of any producing horizon at any depth whateyer; that said well had encountered commercial production in large quantities, whereas in truth and in fact, as said defendants and each of them then and there well knew, said well had not encountered commercial production.

[fol. 11] (i) On and after February 6, 1937, said defendants represented and stated to the persons to be defrauded that the well which was being drilled on the oil and gas lease, title to an undivided one-half interest of which was vested in the Edwards Indian Chief Trust, had encountered a gas bearing horizon and that the gas pressure nearly took the well away from them, whereas in truth and in fact, as said defendants and each of them then and there well knew, said well had not encountered gas in sufficient quantities to in any way endanger or bring about the loss of said well.

And your Grand Jurors aforesaid, upon their oaths aforesaid, do further find, present and charge:

That the defendants on or about the 18th day of February, 1937, at Frederick, in the State of Oklahoma, Western District of Oklahoma, and within the jurisdiction of this Court, for the purpose and with the intent of employing said device, scheme and artifice to defraud one of the persons to be defrauded, to-wit: Harper L. Proctor, unlawfully, willfully and feloniously, in the sale of certain securities, to-wit: units or certificates of beneficial interest in Indian

Chief Protection Lease Trust, by the use of the United States mails, did employ said device, scheme and artifice to defraud in violation of Section 17 (a) (1) of the Securities Act of 1933, as amended (Section 77q, Title 15, U. S. C. A.), in the following manner:

Said defendants on or about said 18th day of February, 1937, placed and caused to be placed in the post office of the United States of America at Frederick, Oklahoma, a certain four page letter enclosed in an envelope with the necessary postage prepaid thereon, to be sent and delivered by the post office establishment of the United States of America to said Harper L. Proctor at 325 Peninsular Life Building, Jacksonville, Florida, said letter commencing with substantially the following words, to-wit:

"Dear Dr. Proctor:

"I am sending you another late-at-night letter. I have just come in from 'Indian Chief'. It is now nearly four o'clock in the morning, and I am desperately tired—but, I am happy. So happy that I could not even think of sleeping until I wrote you the good news."

And said letter closing with substantially the following words, to-wit:

[fol. 12] "I want everyone of my associates to be in a position to cash in for the Biggest Possible Amount. These $10.00 Units may return you 10—20—40—or 50 for one in the next few days—for, Partner, we have hit! I am confident of a new oil field being born in 'Indian Chief'—and it belongs to you and me. I will expect your reply by return mail or wire for from one to fifty $10.000 Units.

"Your friend and Partner in the field.

(Signed) H. R. Edwards."

All of which acts of the said defendants and each of them were contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count Two

And your Grand Jurors aforesaid, upon their oaths aforesaid, do further find, present and charge:

That the defendants named in the first count of this indictment on or about the 1st day of December, 1936, at Fred-

erick, in the State of Oklahoma, in the Western District of Oklahoma, and within the jurisdiction of this Court, so having, as set forth in the first count of this indictment, employed and intended to employ said device, scheme and artifice to defraud the persons to be defrauded, the allegations of the first count of this indictment descriptive of said device, scheme and artifice to defraud, and of the connection of the said defendants therewith including allegations of intent and knowledge on the part of said defendants and each of them, are hereby incorporated in this count by reference to said first count as fully as if here repeated, for the purpose and with the intent then and there upon the part of said defendants and each of them of employing said device, scheme and artifice to defraud one of the persons to be defrauded, to-wit: Harvey K. Rose, unlawfully, wilfully and feloniously, in the sale of certain securities, to-wit: Units or certificates of beneficial interest in said Indian Chief Additional Development Trust, by use of the United States mails, did employ said device, scheme and artifice to defraud in violation of Section 17 (a) (1) of the Securities Act of 1933, as amended, (Section 77q, Title 15, U. S. C. A.) in the following manner:

Said defendants on or about said 1st day of December, [fol. 13] 1936, did place and cause to be placed in the post office of the United States of America at Frederick, Oklahoma, a certain eight page letter, enclosed in an envelope with the necessary postage prepaid thereon, to be sent and delivered by the post office establishment of the United States of America to one of the persons to be defrauded, to-wit: to the said Harvey K. Rose at 850 West Exchange Street, Akron, Ohio, said letter commencing with substantially the following words, to-wit:

"Dear Mr. Rose:

"I have just driven in from 'Indian Chief' to give you the good news—as soon as I write you I will be on my way back to the well—because I believe we are near a Big Success."

and said letter closing with substantially the following words, to-wit:

"Take one—ten—twenty or More of these Units—now.

"They are limited in number—You Must Rush Your Order.

Yours for Bigger Profits,

(Signed) H. R. Edwards."

All of which acts of the said defendants and each of them were contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count Three

And your Grand Jurors aforesaid, upon their oaths aforesaid, do further find, present and charge:

That said defendants named in the first count of this indictment, then and there well knowing the facts in this indictment set forth, in the sale of securities, to-wit, units or certificates of beneficial interest in Edwards Indian Chief Trust, did by the use of the United States mails obtain money from one of the persons to be defrauded by means of omissions to state material facts necessary to be stated to make the statements made by said defendants to said person to be defrauded, in the light of the circumstances under which they were made, not misleading, in the following manner, to-wit:

That on or about the 9th day of October, 1936, said de-
[fol. 14] fendants did send to one of the persons to be defrauded, to-wit: Willard W. Penry, a certain letter with the intent and for the purpose of inducing said Willard W. Penry to purchase certain securities, to-wit, units or certificates of beneficial interest in a business trust organized by said defendants under the laws of the State of Oklahoma and known and referred to as Edwards Indian Chief Trust, said letter being substantially of the following tenor, to-wit:

"Dear Mr. Penry:

"My word is my bond!!!

"You received a letter from me last week—perhaps you are among the scores who have answered that letter—perhaps you were among those who have literally swamped me with replies by every mail—by air-mail—by telegram—

Taking Me At My Word—and putting me to the acid test to Prove My Statements!!"

"I have not had time to check up on my books—I do not know if you were among that number or not—but—again I say—with all honesty and all sincerity—

Will You Be Interested In Making Up To One Thousand Dollars—Or More? At A Cost Of Only $10 For Each Potential Thousand-Dollar Winning!! In A Short Sprace Of Time That May Possibly Be Measured By Weeks!!

"That is the proposition that I put to you—and to others—in my letter of last week. Scores have answered—scores have agreed to co-operate with me—scores have taken advantage of my offer—to come in with me—And Make One Of The Boldest And Most Courageous Bids For Big Profits They Have Ever Been Offered!!

"As I said—I do not know if you were in that number, as I have not had time to check up and see—but—whether you were or not—I write you again. I write you as an honest man who has everything to gain by putting himself to The Rigid Acid-Test Of Public Approval—and who says to you again: I Have A Proposition That Is So Startling That You May Read Every Word Of This Letter In Rank Unbelief—You May Not Be Able To Believe It—I Admit That It Is So Bit That It May Strain Your Belief To The [fol. 15] Breaking Point—Because The Chances For A Big Profit To You Are So Enormous—That You Simply May Not Be Able To Believe Such A Situation Can Come To You!

"But—whether you have already joined me—or whether you have not been able to accept my offer—I ask you again to read what I have to say—Read With An Open Mind—Read With Your Critical Eye Open For Faults And Flaws—Read With The Determination To Pick Out Every Flaw In This Proposition—Then—Decide Strictly Upon Its Merit!!

"I said at the start of this letter that—'My Word Is My Bond'.

"But I don't want you to take my word for a single thing I say to you—I want you to Test What I Say—and Prove For Yourself—and be convinced for yourself that—You Have A Chance Here To Make The Biggest And The Quickest Profit Of Your Lifetime!!

"And—my friend—when You Make a Big Profit—There are four things that absolutely Must contribute to that Profit-Taking—

(1) The Property Must Be Good—(2) The Profit-Chances Must Be Present—(3) Your Chance To Share Must Be In Your Reach—(4) The Man Who Offers You That Chance Must Be Efficient and Honest!!

"I base this offer to you upon those Four Grounds—and upon no other grounds. This is the apex and climax of my years of experience in the oil business—it is the crowning effort of my life—it is the One Big Chance that I have looked for for years for myself—and I am staking my years of experience upon One Quick Play For The Big Money For Those Who Help Me—For You, If You Choose To Be Among That Number!!

"Remember that I have 500 acres in 'Indian Chief'—and—Five Hundred Acres Can Be A Mighty Oil Empire, When Successfully Developed.

"Now—let me give you a 'Picture'—of what I have to offer:

"I have just come in from my 'Indian Chief' lease in Stephens County, Oklahoma. I stood upon that lease today [fol. 16] under the hot glare of an Oklahoma sun—and I wished that You could have stood by my side—and could have seen with your own eyes, what fell under my gaze.

"I stood on the North boundary of this property—and I asked myself this question: 'How can I paint a "picture"—how can I describe the location and possibilities of "Indian Chief"—that will show to those whom I have asked to join me in this operation, the marvelous possibilities before us'?

"And I said to myself: 'If I write You the exact Facts—all the Facts—and nothing but the Facts—then—You Must Believe—because—"Truth Will Always Prevail"—and be its own defender!

"Therefore—as I stood on the North Boundary of 'Indian Chief'—I determined to try and give you a 'picture' of what I saw:

"To the South—just about three miles from the southern boundary of 'Indian Chief' was visible in the distance, the mighty forest of derricks of the great Duncan Field. There is a field of 2,500 acres—on which approximately 500 producing wells have been drilled—and which wells have produced around Forty-Five Million Barrels Of Oil—and are

still producing approximately—Two Million Barrels Of Fortune-Making Oil Per Year!!

"What a wonderful field'! What Fortunes In Oil have been produced by that field!!' What a Fortune For Us—With Wells Of Similar Size On 'Indian Chief'!!! And—what a thrill it gave my heart to realize that 'Indian Chief( is located in the area known as the North Extension Of The Duncan Field!!

"Then—still standing on this North Boundary—I let my eyes go to the Southeast—less than three miles away—even closer than the Duncan Field—I could see the approximate area covered by the Angle & Brogan Gas Field—Which Wells Come In Making Ten To Fifteen Million Cubic Feet Of Wet Gas Per Day—and I thrilled again to the realization that such gas wells, on 'Indian Chief'—should find a ready and quick market for their product to a big major gas company, whose pipe-lines are already laid across our [fol. 17] property—And Which Company Has Already Assured Me That They Would Purchase Our Gas As Produced!!

"And—still standing on this North Boundary—I looked to the West—where I could see the leases known as the 'School Land Pool'—Directly Offsetting 'Indian Chief'—where commercial gas wells are already completed making an initial production of from Five To Fifteen Million Cubic Feet Of Gas Per Day—and, still a little more West—only a little more than a mile from 'Indian Chief'—Was the 'Flowers Pool' whose discovery well made an initial flow of Ten Million Cubic Feet Of Wet Gas, with a rock pressure of 860 pounds!

"And—still standing on this North Boundary—I could see, less than ¾ths of a mile away—the derrick that marks the bringing in of the discovery well of the 'Johnson Pool'—which well seems to be producing on what I would term 'Off-Structure'.

"And—still standing on this North Boundary—I could see the top of the great 120-foot steel derrick that marks the test Now Drilling—less than a mile-and-a-half Northeast Of 'Indian Chief'—which test is reported to be seeking the famous Wilcox Sand—at around 7,000 feet—and around which test—Major Companies Are Reported To Have Purchased One Hundred Thousand Dollars Worth Of Leases—'!

"And—what an additional thrill it gave my heart to realize that the block on which this 7,000-foot test is located —Directly Adjoins 'Indian Chief'—On The East And Northeast!!

"Now—this is the 'picture' that I want to give you:

To the South—the great Duncan Field.

To the Southeast—the Angle & Brogan gas field.

To the West—the 'School Land' and the 'Flowers' Pools.

To the East—The great 7,000-foot test to the Wilcox sand.

"And—remember this—these pools—surrounding us on three sides—are not miles and miles away—they are not what you would call in the 'general area', which might mean [fol. 18] fifteen or twenty miles distant—but—They Are Close-Up—One Of Them Directly Adjoining 'Indian Chief' —And Seem To Prove Unquestionably—That This Lease Is Not In The 'Wildcat' Class—But Is Already As Near A Proven Property As It Is Possible To Imagine Before Actual Drilling!!

"You positively cannot make money unless the producing sands are under your property—and—from the evidences already Known To Me—I am absolutely convinced that such Sands Are To Be Found Under 'Indian Chief'. Let me explain what I mean:

"The geological report that I have on 'Indian Chief' says that Five Sands Underlie This Property. This report also says that the 'School Land Pool' to the West of 'Indian Chief' encountered its heavy gas production at around 1,800 feet. And—I was told by the Superintendent of the 7,000-foot test to the East of 'Indian Chief'—that this test encountered this same sand—at around 1,800 feet—Proving That This Sand Extends East and West—And If Found On Both Sides Of 'Indian Chief'—Then It Surely Must Be Found Under 'Indian Chief'!! That's just plain common sense.

"Then—the 'Johnson Pool' on the North went to a deeper sand—and Is Now Producing Oil, Less Than ¾ths Mile Distant From 'Indian Chief'—at around 2,480 feet—while to the Southeast Of 'Indian Chief' the 'Angle & Brogan Pool' is producing from the same sand proving that—This 2,480-Foot Sand Must Extend North and South —And Under 'Indian Chief'.

"Under such conditions—I claim—that This Is Not A 'Wildcat' Lease—Because The Evidence Points To Two

Producing Sands—From Wells Already Drilled—Whose 'Logs' Are Known!!

"And as I have already stated—a geoligical report prepared by Roy E. Cooper, Petroleum Engineer, one of the outstanding geologists of Oklahoma, states that—there are Five Known Producing Sands Under 'Indian Chief'—and a portion of his report follows:

'Oil And Gas Resources Under Your Properties'

'There are five known producing sands that underlie your properties'.

[fol. 19] '(1) The James sand found at 1375 to 1,400 feet.

'(2) The flowers sand found at 1880 to 1900 feet.

'(3) The Johnson sand found at 2300 to 2375 feet.

'(4) A stray sand found at 2475 to 2500 feet.

'(5) The Van Clive sand found at 3250 to 3275 feet.

"All these sands should produce oil or gas under your lease'.

"With such statements from a geologist of known standing—and with these Known Producing Pools On Three Sides—to the South and Southeast and to the West—and to the North—and with the 7,000-foot test now drilling to the East on a block directly adjoining our own property, I have no hesitancy in stating that the 'Indian Chief' Property Is Today The Biggest And The Quickest Chance For A Profit Of Tremendous Size That You Ever Saw In All Your Life And All Your Experience In Oil Investments.

"And—I want again to call your attention to two most significant factors: (1) Major companies have already indicated a desire to purchase the properties of 'Indian Chief'—and major companies already own leases practically all around and in every direction around 'Indian Chief'—and—(2) Major Companies are reported to have already purchased around One Hundred Thousand Dollars Worth Of Leases around the test well drilling on the block directly adjoining 'Indian Chief' on the East!!

"Do you think that the big major concerns would be interested in this area unless they were convinced—or had good reasons to believe—that—A Discovery Field Of Major Proportions May Be In The Making In The 'Indian Chief' Area???

"Now—my friend—this is the situation of my properties—you have the whole story. Yet, there are two things I wish to add:

"First—the 7,000-foot test East of 'Indian Chief' is drilling for the famous Wilcox sand. This is the sand that has made the great Oklahoma City Field—the sand that has made the great Logan County field where Carter and Gulf have recently brought in a raging 60,000 barrel gusher—and which sand has made possible some of the biggest [fol. 20] lease sales in this state, including one in the Oklahoma City field where I am told a consideration of around $300,000 was paid for only 20 acres—which—was an acre price of around Fifteen Thousand Dollars Per Acre! Therefore—no wonder that I am deeply and vitally interested in this 7,000-foot test—and no wonder that the big majors are said to have already bought around $100,000 worth of 'protection' acreage around this test—because—from this test alone may result—A Fortune Of Magnitude—Of Tremendous Proportions—To Myself And My Associates In 'Indian Chief'!

"And—Second: I have already moved on 'Indian Chief' one of the biggest and strongest rigs I could find—with a magnificent 122-foot steel derrick—and heavy machinery—capable of making a 7,000-foot test for ourselves—if necessary and deemed advisable—and—by the time you receive this letter—we will be spudded in—and perhaps already drilling—for one of the Five Sands reported to exist under 'Indian Chief' by Geologist Cooper.

"I Believe A Few Weeks Or Quick Drilling Will Carry Us Down To One Of These Sands—And That—Unquestionably—We Shall Be Able To Make A Well—Whose Value May Run—Into An Enormous Sum Of Money—For Distribution Among My Associates!!

"Now then—do you want to participate in an operation like this—where—quick success may bring—a return of Hundreds Of Dollars—or—Possibly—Thousands Of Dollars—to You???

"Remember—our 'Trust' has a half-interest in a full 500-acres!!

"You know—as well as I do—what 500 acres should be worth, with a producing well of Gusher Calibre!!

"You know that such acreage, when proven, should sell for an attractive—a most alluring Profit!!

"And—you know that with a reasonable interest in such a property—You Have The Biggest Chance Of A Lifetime To Make A 'Killing-!

"I have capitalized this half-interest in 500 acres at only 1,500 units—at $10 per unit—making a total of only $15,000 capitalization on the one-half interest in the well [fol. 21] and 500 acres—thereby giving us tremendous profit possibilities.

"As I told you in my last letter—interests in the Fowler discovery well of Burkburnett—sold originally at $100 each—paid holders thereof the amazing sum of Twelve Thousand Dollars—or—$1,200 for each ten dollars invested.

"I do not believe I am overstating when I say that we have a possibility for profits of enormous size—because—such profits have been made by others from 'Wildcat' leases—and—we have such evidences around us as to lead to the common-sence conclusion that we are practically out of the 'Wild-cat' class—and on property that is almost Proven.

"I believe there are Attractive Profits For You—Here!!

"Yet—I again wish to say that—if you are unable to take a 'gamble' like this—I do not wish you to come in with me. This operation is for those who are able to 'play' for the giant money that a discovery field can bring. And—if you are able and willing—I believe you now have before you the chance you have been seeking—the opportunity you have been wishing would present itself to you—and I say to you—that I sincerely and honestly believe—We Have The Biggest Proposition Of A Lifetime—For A Quick Profit Of Large Size—From A Small Investment.

"Yet I must warn you:

"Unless you take my offer—At Once—I cannot guarantee that your o-der will be filled for units—because—those who are able to participate are coming in by every mail—And The Limited Number Of Units Will Soon Be Gone.

"I admit that this is the biggest thing I have personally ever had the good fortune to be in on—as I have said before, it is the apex and the climax of my many years in the oil business—I have never had the privilege to participate in a property of this character before—and—scores of new friends and associates—to whom this proposition was presented last week—are also a-reeing that—It Is The Biggest [fol. 22] Chance They Ever Had—and—The Limited Number Of Units Available Are Decreasing At Such A Rapid

Rate That I Must Warn You—If You Delay—You Will Be To- Late!!

"And—I want to add this: These units are being sold for just one purpose—to finance development of this lease. You can realize that a property of this type—and the drilling of a well of this type—cannot return a large profit to me—I Must Get My Profit From The Same Source As You Get Your Profit—which is—A Completed Well—And A Sale Of This Lease At An Attractive Figure!!

"Now—just a few last words:

"There are Four things that absolutely Must Contribute to and Profit-Taking (1) Good property—(2) Good profit—chances—(3) An easy chance for You to share—and—(4) A capable man at the head of it all.

"I have told you about the property—you know what it offers—you can see that it is exceptional in every particular—it looks to be as near a 'Cinch' as anything I have ever contacted. I have also told you about the profit-chances. You can see what a regular Whale Of A Profit we stand to make—in the near future.

"And I have also told you how You May Share—at the rate of $10 per Unit—for as many Units as you care to purchase, if you get in before others take them all.

"But—there is one thing I haven't told you about—and that is myself:

"I could send you scores of -etters. I could tell you how I am trusted by others. I could tell you my credit-rating here in Frederick. I could sent you letters showing you what others think of me. But all these mean nothing unless I Make You Money. You can't buy a new home with recommendations. What You Want Is Results—Cash Money Results!!

"If you want personal recommendations I can give them to you—but—Here Is My Biggest Recommendation:

"Purchase as many Units as you desire in 'Indian Chief'—make sure that you are protected in this opportunity to the fullest extent while the chance is still open—Then Come [fol. 23] Down Here—Go With Me To The Lease—See The Big Duncan Field To The South—See The Angel & Brogan Field To The Southeast—The Flowers Pool And The School Land Pool To The West—The 7,000-Foot Test To The East—And My Own Big 122-Foot Derrick And Heavy Machinery On 'Indian Chief'. Talk To Any Person In This Entire Area—Go Over Geological Reports—See The

Proven Gas Fields—And The Proven Oil Fields Around—And Then—If You Are Not Entirely Satisfied That Every Word I Have Written You Is True—And That You Have The Biggest Chance Of Your Lifetime To Make The Kind Of A Profit I Predict—I Will Refund Every Dime Of Your Transportation Both Ways Down Here—And I Will Refund Your Money You Paid For Units In 'Indian Chief'!!

"This is the kind of recommendation I offer you---and—if you ever had a chance to prove the sincerity of a man—you have it now.

"But—Whatever You Do—Do Now—Or—Be Too Late!!

"And—also remember—if I fail to make you a profit—I absolutely warrant to you that—I Will Re-Place You—Without Further Cost—in my next operation!!

"You have only a limited time to take advantage of this offer.

"There were only a small number of units to start with—and the rapid way in which these are being taken points to one outstanding fact: The Late-Comer Will Be Left Out.

"Make out your order now—for as many Units as you desire.

"Others are taking them fast—many are ordering ten units—some only one unit—but—the orders are coming in so fast that I am assured the small number first offered will soon be gone.

"Take one—two—or—Five Units—or up to Twenty—but—you must—Do It Without Delay!!

"Remember the price is $10 per unit.

"If you Must have time payments—send $5 down per unit—and the other $5 in 15 days.

[fol. 24] "A Ten-Dollar Bill may make you Hundreds—!!

"It may make you a Thousand Dollars—or more!!

"but it won't make you one red cent if you are not 'in'.

"therefore—let your *o-der* be filled in Now——

"With the distinct understanding that—My Word Is My Bond—and—after you have purchased—if you come down and go over the area—and find any misrepresentation—I will refund your money—and refund your transportation.

"But—Without Doubt And Without Fail * * * You Must Come In Now—Or Forever Be Left Out!!

"Use the quickest method you can get to return your order to me.

Yours—for the Profits You have been seeking,

Sincerely, (Signed) H. R. Edwards."

That said defendants wholly omitted to state to said Willard W. Penry in said letter or by any other means that between the lease referred to in said letter as the Indian Chief, and the Duncan Field referred to in said letter as being about three miles south of the Indian Chief lease, a test well for oil and gas had been drilled by Meridian Gas Company to a depth of about 3001 feet, and on or about August 27, 1929, had been abandoned as a dry hole, such fact being well known to said defendants and each of them at all times herein mentioned, as such fact being material in order to make the statements made by said defendants, in the light of the circumstances under which they were made, not misleading;

That said defendants wholly omitted to state to said Willard W. Penry in said letter, or by any other means, that between the lease referred to in said letter as the Indian Chief, and the Angle & Brogan Gas Field referred to in said letter as being less than three miles southeast of said Indian Chief Lease, a test well for oil and gas had been drilled by Morgan et al. to a depth of about 2579 feet and on or about February 27, 1935, has been abandoned as a dry hole, such fact being well known to said defendants and each of them at all times herein mentioned, and such fact being material in [fol. 25] order to make the statements made by the said defendants in the light of the circumstances under which they were made, not misleading;

That said defendants wholly omitted to state to said Willard W. Penry in said letter or by any other means that between the lease referred to in said letter as the Indian Chief, and the School land Pool referred to in said letter as directly offsetting on the west said Indian Chief Lease, a test well for oil and gas had been drilled by Malneree et al. to a depth of about 2530 feet and during the year 1926 had been abandoned as a dry hole, such fact being well known to said defendants and each of them at all times herein mentioned, and such fact being material in order to make the statements made by the said defendants, in the light of the circumstances under which they were made, not misleading;

That said defendants wholly omitted to state to said Willard W. Penry, in said letter or by any other means, that between the lease referred to in said letter as the Indian Chief, and the 7,000 foot test well referred to in said letter as being drilled less than one and one-half miles northeast of said Indian Chief Lease, a test well for oil and gas had

been drilled by Smythe et al. to a depth of about 3123 feet and on or about May 13, 1930, had been abandoned as a dry hole, such fact being well known to said defendants and each of them at all times herein mentioned, and such fact being material in order to make the statements made by said defendants, in the light of the circumstances under which they were made, not misleading;

That said defendants wholly omitted to state to said Willard W. Penry in said letter or by any other means, that between the lease referred to in said letter as Indian Chief, and the Flowers Pool referred to in said letter as being a little more than one mile west of said Indian Chief Lease, a test well for oil and gas had been drilled by Magnolia Petroleum Company to a depth of about 4555 feet and during the year 1925 had been abandoned as a dry hole, such fact being well known to said defendants and each of them at all times herein mentioned, and such fact being material in order to make the statements made by said defendants, in the light of the circumstances under which they were made, not misleading;

That said defendants wholly omitted to state to said Willard W. Penry in said letter or by any other means, that near [fol. 26] the north boundary line of the lease referred to in said letter as Indian Chief, and between the Johnson Pool referred to in said letter, and the location of the well to be drilled on said Indian Chief Lease, a test well for oil and gas had been drilled by Drake et al. to a depth of about 2700 feet and during the year 1923 had been abandoned as a dry hole, such fact being well known to said defendants and each of them at all times herein mentioned, and such fact being material in order to make the statements made by such defendants, in the light of the circumstances under which they were made, not misleading;

And your Grand Jurors aforesaid, upon their oaths aforesaid, do further find, present and charge:

That said defendants on or about the 25th day of October, 1936, in the City of Frederick, in the State of Oklahoma, in the Western District of Oklahoma, and within the jurisdiction of this Court, unlawfully, wilfully and feloniously, in the sale of a security, to-wit, three units in Edwards Indian Chief Trust, by use of the United States mails, did obtain money, to-wit: $30.00 from said Willard W. Penry by means of the aforesaid omissions to state the material facts

hereinbefore set forth which were necessary to be stated in order to make the statements made, in the light of the circumstances under which they were made, not misleading, said use of the United States mails in the sale of said securities being in the following manner, to-wit:

That on or about the 9th day of October, 1936, said defendants did place and cause to be placed in the post office establishment of the United States of America, at Frederick, Oklahoma, a certain letter enclosed in an envelope bearing the necessary postage, to be sent and delivered by the post office establishment of the United States of America to said Willard W. Penry at LaJolla, California, said letter being substantially of the tenor hereinbefore in this count of this indictment set forth.

All of which acts of the said defendants, and each of them, were against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided (Section 17(a) (2) of the Securities Act of 1933, as amended; Section 77q(a). (2), Title 15, U. S. C. A.)

[fol. 27] Count Four

And your Grand Jurors aforesaid, upon their oaths aforesaid, do further find, present and charge:

That said defendants named in the first count of this indictment having organized, controlled and created the various business trusts described in paragraphs numbered 2, 3, 4, 5 and 6 of the first count of this indictment, the allegations of said paragraphs 2, 3, 4, 5, and 6 of the first count of this indictment are hereby incorporated in this count by reference to said paragraphs of said first count as fully as if here repeated, and on or about the 18th day of March, 1937, at Frederick, Oklahoma, in the Western District of Oklahoma, and within the jurisdiction of this court, there not then being in effect a registration statement filed with the Securities and Exchange Commission under the provisions of Section 5(a) of the Securities Act of 1933, as amended, (Section 77e, Title 15, U. S. C. A.) as to a certain security, to-wit: certificates or beneficial interest in Indian Chief Protection Lease Trust, said certificates of beneficial interest being of the class and character of securities defined in Section 2 of said Act, and having wholly failed to file such registration statement with

respect to said security, unlawfully, wilfully and feloniously did use the United States mails to sell said security in violation of Section 5(a) (1) of the Securities Act of 1933, as amended, (Section 77e(a) (1), Title 15, U. S. C. A.) in the following manner, to-wit:

Said defendants on or about said 18th day of March, 1937, did place and cause to be placed in the Post Office of the United States of America, at Frederick, Oklahoma, a certain three page letter enclosed in an envelope with the necessary postage prepaid thereon, addressed to W. E. Mitchell at Merton, Wisconsin, to be sent and delivered by the Post Office establishment of the United States of America, said letter commencing with substantially the following words, to-wit:

"Report On 'Indian Chief'

"Dear Mr. Mitchell:

"We are ready to drill the plug on 'Indian Chief'—By this time next week, 'Indian Chief' should be in."

and said letter closing with substantially the following words, to-wit:

[fol. 28] "I will probably be at the well day and night now, until it is completed—But my bookkeeper has instructions to hold your reservation for you until your reply is received—He will, also, forward your present unit certificate in the next few days—I will be expecting your answer by return mail—I again tell you I am confident of a big well and assure you I will flash you the good news the minute it happens, I remain, your friend and partner.

Sincerely, (Signed) H. R. Edwards."

All of which acts of said defendants, and each of them, were against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

Count Five

And your Grand Jurors aforesaid, upon their oaths aforesaid, do further find, present and charge:

That said defendants named in the first count of this indictment having organized, controlled and created the various business trusts described in paragraphs numbered 2, 3,

4, 5 and 6 of the first count of this indictment, the allegations of said paragraphs 2, 3, 4, 5 and 6 of the first count of this indictment are hereby incorporated in this count by reference to said paragraphs of said first count as fully as if here repeated and on or about the 31st day of March, 1937, at Frederick, Oklahoma, in the Western District of Oklahoma, and within the jurisdiction of this court, there not then being in effect a registration statement filed with the Securities and Exchange Commission under the provisions of Section 5(a) of the Securities Act of 1933, as amended, (Section 77e, Title 15, U. S. C. A.) as to a certain security, to-wit: certificates of beneficial interest in Indian Chief Protection Lease Trust, said certificates of beneficial interest being of the class and character of securities defined in Section 2 of said Act, and having wholly failed to file such registration statement with respect to said security, unlawfully, knowingly, wilfully and feloniously did carry and cause to be carried through the United States mails said security for the purpose of delivery after sale in violation of Section 5(a) (2) of the Securities Act of 1933, as amended, (Section 77e(a) (2), Title 15, U. S. C. A.) in the following manner, to-wit:

[fol. 29] Said defendants on or about said 31st day of March, 1937, did place and cause to be placed in the Post Office of the United States of America, at Frederick, Oklahoma, a certain written certificate evidencing one unit in said Indian Chief Protection Lease Trust, said certificate, together with a letter of transmittal, being enclosed in an envelope with the necessary postage prepaid thereon, addressed to Frederick D. M. Soules at Wheeling, West Virginia, to be carried and delivered by the Post Office establishment of the United States of America to said Frederick D. M. Soules at Wheeling, West Virginia, and said envelope, together with the contents thereof; was thereupon carried and delivered by said Post Office Establishment of the United States of America according to the directions thereon to said Frederick D. M. Soules at Wheeling, West Virginia.

All of which acts of said defendants, and each of them, were against the peace and dignity of the United States of America and contrary to the form of the statutes in such case made and provided.

Count Six

And your Grand Jurors aforesaid, upon their oaths aforesaid, do further find, present and charge:

That the defendants named in the first count of this indictment, on or about the 1st day of May, 1936, devised and intended to devise a scheme and artifice to defraud, and for obtaining money and property from the persons to be defrauded by means of the false and fraudulent pretenses, representations and promises in the first count of this inductment mentioned and described, and to defraud said persons to be defrauded of their money and property by the means and in the manner set forth in the first count of this *money and property by the means and in the manner set forth in the first count of this* indictment, the allegations of said first count, descriptive of said scheme and artifice, including the allegations of intent and knowledge, on the part of said defendants and each of them, being by reference hereby incorporated in this count of this indictment, as if set forth and repeated, and for the purpose and with the intent on the part of said defendants, and each of them, of executing said scheme and artifice to defraud, and for obtaining money and property, and attempting so to do, unlawfully, feloniously, fraudulently and knowingly did [fol. 30] deposit and cause to be deposited on or about the 23rd day of October, 1936, in the Post Office of the United States of America at Frederick, Oklahoma, in the Western District of Oklahoma and within the jurisdiction of this Court, a certain two-page letter, commencing with substantially the following words, to-wit:

"Edwards Petroleum Company

Frederick, Oklahoma

October 23, 1936.

Last-Minute News for 'Lucky Indian' Unit Holders

"Miss Jessie Bell DeLaMater, Cedar Rapids, Iowa.

"DEAR MISS DELAMATER:

"I am bringing you a report on 'Lucky Indian' that will give you real joy and satisfaction, for I have just returned from the well, and we are now carefully reaming out, getting ready to set casing, and make the final test, which I sincerely

believe is going to prove up this property for such commercial production as to make a quick sale possible, and some good profits in your hands right away soon."

and said letter closing with substantially the following words, to-wit:

"I want to thank you for your patience and the way you have upheld me by your fine letters, and assure you that I'm going to do my best to merit all you have said, by making a Pay-Off At 'Lucky Indian' the goal.

Your sincere friend, (Signed) H. R. Edwards.

"P. S. Use the application for every interest you can handle in the inclosed letter, this may be your last chance —the units are nearly all gone."

Said letter being enclosed in an envelope with the necessary postage prepaid thereon, addressed to Miss Jessie B. DeLaMater at Cedar Rapids, Iowa, said envelope being substantially of the following tenor, to-wit:

[fol. 31] "(Cancelled stamp).

"Miss Jessie B. DaLaMater
% City Hall
Cedar Rapids, Iowa."

All of which acts of said defendants and each of them were contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count Seven

And your Grand Jurors aforesaid, upon their oaths aforesaid, do further find, present and charge:

That the defendants named in the first count of this indictment, on or about the 1st day of May, 1936, devised and intended to devise a scheme and artifice to defraud, and for obtaining money and property from the persons to be defrauded, by means of the false and fraudulent pretenses, representations and promises in the first count of this indictment mentioned and described, and to defraud said persons to be defrauded of their money and property by the means and in the manner set forth in the first count of this indictment, the allegations of said first count, descriptive

of said scheme and artifice, including the allegations of intent and knowledge on the part of said defendants and each of them, being by reference hereby incorporated in this count of this indictment, as if set forth and repeated, and for the purpose and with the intent on the part of said defendants, and each of them, of executing said scheme and artifice to defraud, and for obtaining money and property, and attempting so to do, unlawfully, feloniously, fraudulently and knowingly did deposit and cause to be deposited on or about the 30th day of January, 1937, in the Post Office of the United States of America at Frederick, Oklahoma, in the Western District of Oklahoma and within the jurisdiction of this Court, a certain seven-page letter, commencing with substantially the following words, to-wit:

"Edwards Petroleum Company

Frederick, Oklahoma

January 30, 1937.

"Mr. Holley B. Osmun, Phillipsburg, N. J.

"DEAR MR. OSMUN:

"At long last—here is the good news—We Are Through [fol. 32] With Our 'Fishing Job'—We Have Passed By The Obstruction In 'Indian Chief'—Casing Is Being Ordered—It Will Be Set At Once—and—We Are Ready—To Bring In Our Well!!"

and said letter closing with substantially the following words, to-wit:

"I am depending on you—as you depend on me.

Your sincere friend and 'partner', (Signed) H. R. Edwards.

"P. S. Our shallow well will be started in the next few days. That means another Big Extra Profit Possibility. I will skid the present derrick over and drill with the present crew, who know the formations, I decided that was the wisest thing to do, as the boys who encountered these shallow sands should be the ones to drill the shallow well—so as to avoid more trouble. That is wise—don't you think?

H. R. E."

Said letter being enclosed in an envelope with the necessary postage prepaid thereon, addressed to Mr. Holley B. Osmun at Phillipsburg, New Jersey, said envelope being substantially of the following tenor, to-wit:

"(Cancelled Stamp).

"Mr. Hooley B. Osmun,
648 Belvidere Ave.,
Phillipsburg, N. J."

All of which acts of said defendants and each of them were contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count Eight

And Your Grand Jurors aforesaid, upon their oaths aforesiad, do further find, present and charge:

That the defendants named in the first count of this indictment, on or about the 1st day of May, 1936, devised and intended to devise a scheme and artifice to defraud, and for obtaining money and property from the persons to be defrauded, by means of the false and fra-dulent pretenses, [fol. 33] representations and promises in the first count of this indictment mentioned and described, and to defraud said persons to be defrauded of their money and property by the means and in the manner set forth in the first count of this indictment, the allegations of said first count, descriptive of said scheme and artifice, including the allegations of intent and knowledge on the part of said defendants and each of them, being by reference hereby incorporated in this count of this indictment, as if set forth and repeated, and for the purpose and with the intent on the part of said defendants, and each of them of executing said scheme and artifice to defraud, and for obtaining money and property, and attempting so to do, unlawfully, feloniously, fraudulently and knowingly did deposit and cause to be deposited on or about the 6th day of February, 1937, in the Post Office of the United States of America, at Frederick, Oklahoma, in the Western District of Oklahoma and within the jurisdiction of this Court, a certain three-page letter, commencing with substantially the following words, to-wit:

"Edwards Petroleum Company,
Frederick, Oklahoma

February 6, 1937.

"DEAR FRIEND AND ASSOCIATE:

"Casing will arrive at the lease tomorrow—the crew will begin to immediately 'run' this in the hole—then, as soon as it is cemented in place, We Will Bring 'Indian Chief' In—for what appears to me to be certain production, that should, immediately make possible the high value on our property that we have anticipated."

and said letter closing with substantially the following words, to-wit:

"I am depending on you. Don't fail me.
"Use this Order Blank enclosed . . . Now!!!!
Your friend and 'partner', (Signed) H. R. Edwards."

Said letter being enclosed in an envelope with the necessary postage prepaid thereon, addressed to Mr. E. H. McKibben at Wadsworth, Nevada, said envelope being substantially of the following tenor, to-wit:

[fol. 34] "(Cancelled Stamp)
"Mr. E. H. McKibben,
Wadsworth, Nevada."

All of which acts of said defendants and each of them were contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count Nine

And your Grand Jurors aforesaid, upon their oaths aforesaid, do further find, present and charge:

That the defendants named in the first count of this indictment, on or about the 1st day of May, 1936, devised and intended to devise a scheme and artifice to defraud, and for obtaining money and property from the persons to be defrauded, by means of the false and fraudulent pretenses, representations and promises in the first count of this indictment mentioned and described and to defraud said persons to be defrauded of their money and property by the means and in the manner set forth in the first count of this indictment, the allegations of said first count, descriptive of said scheme and artifice, including the allegations of intent

and knowledge on the part of said defendants and each of them, being by reference hereby incorporated in this count of this indictment, as if set forth and repeated, and for the purpose and with the intent on the part of said defendants, and each of them, of executing said scheme and artifice to defraud, and for obtaining money and property, and attempting so to do, unlawfully, feloniously, fraudulently and knowingly did deposit and cause to be deposited on or about the 23rd day of January, 1937, in the Post Office of the United States of America at Frederick, Oklahoma, in the Western District of Oklahoma and within the jurisdiction of this Court, a certain two-page letter, commencing with substantially the following words, to-wit:

"Edwards Petroleum Company,
Frederick, Oklahoma

January 23, 1937.

"DEAR FRIEND AND ASSOCIATE:

" 'Lucky Indian' has finally been completed as a nice producer and is a flowing well—I know you are anxious to receive this good news. It gives me great pleasure to [fol. 35] report that this operation has finally been crowned with success after so long a time."

and said letter closing with substantially the following words, to-wit:

"This new well is being started immediately. I believe twenty to thirty days should see both our wells completed as big producers and put us in a position to demand a very fancy price for 'Lucky Indian' when we sell—I will keep you posted and again extend my congratulations to you on the winning we have on 'Lucky Indian'. Will appreciate hearing from you often.

Very truly yours, (Signed) H. R. Edwards."

Said letter being enclosed in an envelope with the necessary postage prepaid thereon, addressed to Mr. Cash S. Clayton at Tampa, Florida, said envelope being substantially of the following tenor, to-wit:

"(Cancelled Stamp)

"Mr. Cash S. Clayton,
General Delivery
Tampa, Fla."

All of which acts of said defendants and each of them were contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count Ten

And your Grand Jurors aforesaid, upon their oaths aforesaid, do further find, present and charge:

That the defendants named in the first count of this indictment, on or about the 1st day of May, 1936, devised and intended to devise a scheme and artifice to defraud, and for obtaining money and property from the persons to be defrauded, by means of the false and fraudulent pretenses, representations and promises in the first count of this indictment mentioned and described, and to defraud said persons to be defrauded of their money and property by the means and in the manner set forth in the first count of this indictment, the allegations of said first count, descriptive of said scheme and artifice, including the allegations of intent and [fol. 36] knowledge on the part of said defendants and each of them, being by reference hereby incorporated in this count of this indictment, as if set forth and repeated, and for the purpose and with the intent on the part of said defendants, and each of them, of executing said scheme and artifice to defraud, and for obtaining money and property, and attempting so to do, unlawfully, feloniously, fraudulently and knowingly did deposit and cause to be deposited on or about the 4th day of November, 1936, in the Post Office of the United States of America at Frederick, Oklahoma, in the Western District of Oklahoma and within the jurisdiction of this Court, a certain four-page letter, commencing with substantially the following words, to-wit:

"Edwards Petroleum Company,
Frederick, Oklahoma

November 4, 1936.

"Mr. J. B. Felty, Altoona, Pa.

"DEAR MR. FELTY:

"I am bringing you the greatest of great news:
"The 7000-foot Test Adjoining 'Indian Chief' Has Hit!!"

and said letter closing with substantially the following words, to-wit:

"I am giving you an 'even break' with myself—the same chance for a Final Cleaning that I have.

"Without fail—take advantage of it.

Your friend, (Signed) H. R. Edwards."

Said letter being enclosed in an envelope with the necessary postage prepaid thereon, addressed to Mr. J. B. Felty at Altoona, Pennsylvania, said envelope being substantially of the following tenor, to-wit:

"(Cancelled Stamp)

"Mr. J. B. Felty,
Altoona, Pa."

All of which acts of said defendants and each of them were contrary to the form of the statute in such case made and [fol. 37] provided and against the peace and dignity of the United States of America.

Count Eleven

And your Grand Jurors aforesaid, upon their oaths aforesaid, do further find, present and charge:

That the defendants, Hiram R. Edwards and R. B. Binger, whose more full, true and correct names are to the Grand Jurors unknown, within three years last past, in the City of Frederick, Oklahoma, in the Western District of Oklahoma, and within the jurisdiction of this Court, did unlawfully, wilfully, feloniously, knowingly and fraudulently, combine, conspire, confederate and agree together, and with each other, and with divers other persons, whose names are to your Grand Jurors unknown, to commit divers and sundry offenses against the United States of America, to-wit: to unlawfully, feloniously, knowingly, fraudulently and willfully violate the provisions of Section 17(a) of the Securities Act of 1933, as amended, (Section 77q of Title 15, U. S. C. A.) by employing a device, scheme, and artifice to defraud in the sale of securities, to-wit: certificates of beneficial interest in H. R. Edwards Comanche County, Oklahoma, Trust, Edwards Indian Chief Trust, Indian Chief Additional Development Trust, Indian Chief Protection Lease Trust, and Edwards Combined Trust, which sales of securities would be made in interstate commerce and by use of the United States mails; and to unlawfully, feloniously, knowingly, fraudulently and wilfully violate the provisions of Section

5(a) of the Securities Act of 1933, as amended, (Section 77(e) of Title 15, U. S. C. A.) by *by.* selling said securities by use of the United States mails without having in effect a registration statement, filed with the Securities and Exchange Commission under the provisions of said Section; and to unlawfully, feloniously, knowingly, fraudulently and wilfully violate the provisions of Section 215 of the Penal Code of the United States (Section 338, Title 18, U. S. C. A.) by making use of the United States Mails in furtherance of a scheme and artifice to defraud, after having devised and intended to devise such scheme and artifice to defraud; that said unlawful conspiracy, combination, confederation and agreement was continuously in existence and in the process of execution by said defendants and divers others persons to your Grand Jurors unknown, throughout all of the time from on or about the 1st day of May, 1936, up [fol. 38] to and including the day of the returning of this indictment, and on each and every day intervening; and said defendants did then and there have it understood and agreed together, and with each other and with divers other persons to your Grand Jurors unknown, that said unlawful conspiracy, combination, confederation and agreement was to be executed, carried out, and continued in existence in substantially the following manner, to-wit:

Said defendants were to organize, control and create the business trusts described in paragraphs numbered 2, 3, 4, 5 and 6 of the first count of this indictment, the allegations of which paragraphs of said count are hereby incorporated in this count by reference to said paragraphs as fully as if here repeated; said defendants were to prepare and cause to be prepared, letters, pamphlets, and circulars, addressed to the persons to be defrauded, in which letters, pamphlets and circulars the false and fraudulent representations and statements set forth in the first count of this indictment were to be made and repeated, the allegations of said first count descriptive of said representations and statements, the falsity thereof, and the true facts in regard to the matters and things concerning which said representations and statements were made, are by reference to said first count hereby incorporated in this count of this indictment, as if here set forth and repeated; said defendants were to place and cause to be placed postage stamps on the envelopes in which said letters, pamphlets and circulars were enclosed, and were to

mail and cause to be mailed said letters in the United States Post Office at Frederick, Oklahoma, to be carried and delivered by the Post Office establishment of the United States of America to the persons to be defrauded; that the defendants, by means of the false and fraudulent representations and statements contained in said letters, were to endeavor to induce the persons to be defrauded to purchase the securities to be issued by the defendants would not file with the Securities and Exchange Commission any registration statement under the provisions of Section 5a of the Securities Act of 1933, as amended, but nevertheless would sell said securities by use of the United States mails and would deliver said securities after sale by use of the United States mails.

That in pursuance of said unlawful conspiracy, combination, confederation and agreement, and in order to carry it [fol. 39] into effect, and in order to effect the object thereof, the defendants and other persons to your Grand Jurors unknown, committed the following and other overt acts, to-wit:

Overt Acts

(1) On or about the 11th day of September, 1936, the defendant, Hiram R. Edwards, at Frederick, Oklahoma, in the Western District of Oklahoma and within the jurisdiction of this Court, executed a Declaration of Trust of Edwards Indian Chief Trust, in which he was designated as sole trustee and as such was vested with title to an undivided one-half interest in certain oil and gas leases, covering lands situated in Stephens County, Oklahoma.

(2) On or about the 25th day of November, 1936, the defendant, Hiram R. Edwards, at Frederick, Oklahoma, in the Western District of Oklahoma and within the jurisdiction of this Court, executed a Declaration of Trust of Indian Chief Additional Development Trust, in which he was designated as sole trustee and as such was vested with title to an undivided one-half interest in certain oil and gas leases, covering lands situated in Stephens County, Oklahoma.

(3) On or about the 24th day of March, 1937, the defendant, R. B. Binger, at Frederick, Oklahoma, in the Western District of Oklahoma and within the jurisdiction of this Court, signed a letter addressed to Cash S. Clayton at Tampa, Florida, in which letter it was stated that a cer-

tificate of beneficial interest in Indian Chief Protection Lease Trust would be sent to said Cash S. Clayton as soon as the same was signed by the defendant, Hiram R. Edwards.

(4) On or about the 12th day of October, 1936, the defendant, R. B. Binger, at Frederick, Oklahoma, in the Western District of Oklahoma and within the jurisdiction of this Court, signed a letter addressed to Miss Jessie Belle DeLaMater at Cedar Rapids, Iowa, in which it was stated that certificates of beneficial interest in "Lucky Indian" would be forwarded at an early date.

(5) On or about the 21st day of December, 1936, the defendant, Hiram R. Edwards, at Frederick, Oklahoma, in the Western District of Oklahoma and within the jurisdiction of this Court, did endorse a certain $30.00 check dated December 19, 1936, signed by Willard W. Penry and drawn on the San Diego Trust and Savings Bank of San Diego, California.

[fol. 40] (6) On or about the 9th day of January, 1937, the defendant, Hiram R. Edwards, at Frederick, Oklahoma, in the Western District of Oklahoma and within the jurisdiction of this Court, did sign a letter addressed to Dr. Harper L. Proctor at Jacksonville, Florida, in which it was stated that a certificate of beneficial interest in "Indian Chief" would be forwarded to said Dr. Proctor during the following week.

(7) On or about the 10th day of October, 1936, the defendant, R. B. Binger, at Frederick, Oklahoma, in the Western District of Oklahoma and within the jurisdiction of this Court, signed a certain letter addressed to Dr. Harper L. Proctor at Jacksonville, Florida, in which it was stated that certificates covering units in "Lucky Indian" would be forwarded to said Dr. Proctor at an early date.

(8) On or about the 8th day of June, 1937, the defendant, Hiram R. Edwards, at Frederick, Oklahoma, in the Western District of Oklahoma and within the jurisdiction of this Court, did sign a Trustee Certificate of Edwards Combined Trust stating that Dr. Harper L. Proctor was the owner of three units in said Trust.

(9) On or about the 24th day of March, 1937, the defendant, Hiram R. Edwards, at Frederick, Oklahoma, in the

Western District of Oklahoma and within the jurisdiction of this Court, did sign a certain Trustee Certificate of Indian Chief Additional Development Trust, reciting that Willard W. Penry was the owner of six units in said Trust.

That said unlawful conspiracy, combination, confederation and agreement and the acts of the defendants in pursuance thereof, were and are contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America (Section 88, Title 18, U. S. C. A.)

John Brett, Assistant United States Attorney.

Endorsed: No. 12682. United States District Court, Western District of Oklahoma. The United States of America vs. Hiram R. Edwards and R. B. Binger. Indictment Violation Section 77e and q, Title 15, U. S. C. A., Section 338, Title 18, U. S. C. A. Section 88, Title 18, U. S. C. A. A true bill. Ernest W. Clarke, Foreman. Filed in [fol. 41] open court this 15" day of Nov., A. D. 1938. Theodore M. Filson, Clerk. Bail $5000 & $1000.

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In United States District Court

Demurrer to Indictment—Filed December 16, 1938

Comes Now Hiram R. Edwards, one of the defendants in the above entitled and numbered cause, and demurs to the indictment herein for the following reasons to-wit:

I

That said indictment wholly fails to charge said defendant with a violation of any valid law or statute under the Constitution of the United States of America.

II

That said indictment is not signed by the foreman of the Grand Jury for the Western District of Oklahoma purporting to have returned said purported indictment.

III

That said indictment and each and every count thereof, except the Eleventh count, is fatally defective for duplicity,

in that the same alleges and sets forth in each of the first ten counts thereof divers and sundry different organizations, companies, trusts and schemes wholly disassociated from each other.

IV

That said indictment, and each count thereof, except count Eleven thereof, is fatally defective for the reason that the allegations contained in the first count of said indictment pertaining to the representations and statements made and to be made by the defendants are not properly negatived, said allegations being incorporated by reference in the other counts of said indictment.

V

That Count 3 of the indictment, which attempts to allege a violation of Section 17 (a) (2) of the Securities Act of 1933 i. e., the sale of Securities by the use of the mails by means of omissions to state material facts necessary to be stated to make the statements made, in the light of the circumstances under which they were made, not misleading; [fol. 42] is defective and the same should be quashed for the reason that the same is made up entirely of conclusions of the pleader and the defendant is not apprised of any fact or facts upon which to base his defense with respect to the allegations to the effect that various omissions were made of material facts, said count of the indictment wholly failing to state wherein the omissions complained of were material and what the circumstances were under which such omissions were made.

VI

That Counts 4 and 5 of the indictment are defective and fail to state a cause of action or charge of a violation of any laws of the United States of America. In this connection said counts attempt to charge a violation of Section 5 (a) (1) of the Securities Act of 1933, in substance to the effect that said defendants used the United States mail in the sale of certain securities without having in effect a registration statement filed with the Securities and Exchange Commission, neither of said counts alleging that the securities so sold by said defendants were not in the class of Securities exempted from registration under Section 3 of the

Securities Act of 1933 and the Rules and Regulations of the Securities and Exchange Commission exempting various classes of securities as provided for by Section 3 (b) of said Securities Act of 1933.

VII

That Counts 6, 7, 8, 9 and 10 of the indictment wholly fail to state a cause of action or charge of a violation of any valid and existing statute of the United States by or against said defendant, said counts attempting to charge a violation of Section 338, Title 18, United States Code.

VIII

That Count 11 of said indictment, to-wit: a charge of conspiracy, fails to properly state a cause of action against or charge of a violation of law by this defendant, and is defective in that said count charges the defendants with a conspiracy to violate the Securities Act of 1933 "by selling said securities by use of the United States mails without having in effect a registration statement, filed with the Securities and Exchange Commission", said count wholly failing to charge that the securities so sold were not of the class of securities exempted from registration under Section 3 of the Securities Act of 1933 and the Rules and Regu-
[fol. 43] lations of the Securities and Exchange Commission promulgated under said Act exempting divers and sundry other classes of securities from registration.

Wherefore, said defendant, Hiram R. Edwards, respectfully prays the Court that this demurrer to said indictment be sustained as to each and every count thereof and that the same be quashed, and in all things held for naught.

Murphy & McCutcheon, Attorneys for Defendant.

[File endorsement omitted.]

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In United States District Court

Plea in Bar and Application for Production of Transcript of Evidence—Filed December 16, 1938

Comes Now, Hiram R. Edwards, one of the defendants in the above entitled and numbered cause, and files this his

plea in bar to the indictment and prosecution herein and makes application to the Court for an order directing and compelling the United States of America, its United States Attorney for this District, and the Securities and Exchange Commission to produce into Court and submit a copy thereof to said defendant, a transcript of certain evidence taken and adduced from said defendant by said Securities and Exchange Commission, and its officers, as more fully hereinafter set forth and enumerated.

For reasons therefor and in connection therewith said defendant would respectfully show unto the Court that on or about the 14th day of April, 1938, and on two successive times, the exact dates being unknown to said defendant, pursuant to certain subpoenas duces tecum served on him by the Securities and Exchange Commission, he appeared before an officer of said Commission at Fort Worth, Texas, and at Oklahoma City, Oklahoma, with the books and records called for in said subpoenas duces tecum and then and there, after having claimed his immunity against self incrimination, as provided by law and the Constitution of the United States, under compulsion, testified under oath, pursuant to various questions propounded and asked him by said officer of said Commission, said testimony concerning said defendant's identity and relationship to various trusts and organizations which are the subject matter of this prosecution and concerning divers and sundry other matters pertaining to the matters which are the subject of this [fol. 44] prosecution, and particularly to the personal entries, books and records of said defendant, which are a part of the subject matter of this prosecution.

That thereafter, as said defendant verily believes, and as he has been informed by the Securities and Exchange Commission, the evidence adduced by said Commission in the course of its investigation, as aforesaid, was transmitted to the Attorney General of the United States of America for criminal prosecution and the indictment herein thereafter returned and that, as said defendant verily believes, and as he has been advised by the Securities and Exchange Commission, said Commission has refused and refuses to make available to said defendant said testimony given by him pursuant to said subpoenas which said hearings and which evidence said defendant verily believes, and has been advised by said Securities and Exchange Commission, may be used by the Government in the prosecution of this cause.

That said defendant at each of the times aforesaid, when appearing before said Securities and Exchange Commission and its officers pursuant to said subpoenas claimed his immunity against self incrimination as aforesaid, prior to his testifying, but was compelled to testify against himself and to give information and testimony under oath which it is believed the Government will use against him in the prosecution herein and by virtue of said defendant having so testified he is immune from prosecution herein, all as provided for by law, the Constitution of the United States, and particularly Section 22 (c) of the Securities Act of 1933, as amended.

That at the time of said hearings said defendant made demand upon said officers of said Commission for a copy of the transcript of said defendant's said testimony and then and there offered to pay the costs thereof, but said demand and request of said defendant was refused by said officers of said Commission and thereafter, on the 1st day of December, 1938, said defendant, by and through his counsel, again made demand on the Securities and Exchange Commission for a copy of said transcript of said testimony, which request and demand of said counsel was on the 8th day of December, 1938, refused by said Commission, by and through Robert E. Kline, Jr., Assistant General Counsel of said Commission, a true and correct copy of his letter being marked Exhibit "A", and attached hereto and made a part hereof.

[fol. 45] That it is necessary in the presentation to the Court of this plea in bar that said defendant have a copy of said transcript of said testimony given by him before said officers of said Commission, and all of the same, at each and every of said hearings and continuances thereof, and which copy said defendant has heretofore tendered and now tenders payment therefor and said defendant further says that it is necessary that this Court have before it in passing on said plea in bar a copy of the transcript of said testimony, which transcript of said testimony defendant respectfully asks the Court to order the United States of America, the United States Attorney for this District, and the Securities and Exchange Commission to produce and furnish this defendant a true, correct and complete copy of said transcript of said testimony in each and every of said hearings.

Wherefore, said defendant respectfully prays the Court that said transcript of said testimony be produced by said

Securities and Exchange Commission and forthwith submitted to said defendant and that he be heard on the merits of this plea in bar, and that by virtue of his having testified before said commission, under compulsion, pursuant to subpoena, after having claimed his privilege against self incrimination, that the prosecution herein be forever barred, and that the charges against said defendant herein be dismissed, and said defendant discharged.

Murphy & McCutcheon, Attorneys for Defendant.

[Verification omitted.]

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EXHIBIT "A" TO PLEA IN BAR

"Securities and Exchange Commission

Washington, December 8, 1938.

Air Mail.

J. Forrest McCutcheon, Esq., Messrs. Murphy & McCutcheon, 780 First National Building, Oklahoma City, Oklahoma.

Re: H. R. Edwards—FW 306

DEAR SIR:

This will acknowledge receipt of your letter of December [fol. 46] 1 in which you ask to have furnished you a transcript of the testimony taken by this Commission in connection with its investigation.

Inasmuch as the evidence adduced by the Commission in the course of its investigation was transmitted to the Attorney General for criminal prosecution and an indictment has been returned, this Commission does not feel it proper to make available to the defendant the testimony taken from witnesses which may be used by the Government in the prosecution of its case. In view of this, the Commission must respectfully refuse to comply with your request. The United States Attorney concurs in this view.

Even if you were to attempt to serve a subpoena duces tecum on any official of the Commission to produce such testimony, the Commission would be obliged to instruct such official to assert his privilege of refusing to produce evidence obtained in the course of an investigation by a duly authorized branch of the Government which, under the

authority of the Statute, has been turned over to the Attorney General for use in the prosecution of a criminal case. In my opinion the Court would no more compel its production than it would the production of testimony adduced by any other duly authorized investigating body and is as exempt from production for the benefit of a defendant as would be the evidence taken before a grand jury.

Very truly yours, for Chester T. Lane, General Counsel: Robert E. Kline, Jr., Assistant General Counsel.

[File endorsement omitted.]

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In United States District Court

Motion to Strike Plea in Bar and Objection to Production of Transcript of Evidence—Filed February 28, 1939

Comes now the Government, the United States of America, and makes this its motion to strike plea in bar of Hiram R. Edwards, and objects to production of transcript of evidence, and in its grounds therefor says:

I

That the plea in bar wholly fails to state or allege facts [fol. 47] constituting the compulsion complained of or any compulsion of any nature whatsoever.

II

That the plea in bar fails to allege what testimony was given by the defendant which tends to incriminate him.

III

That the plea in bar does not allege that the books and records, alleged to have been produced before the examiner, were in fact delivered to the examiner in response to the subpoena issued and served upon the defendant.

IV

That the defendant, Hiram R. Edwards, was never sworn at any time during the proceedings or hearings complained

of and at no time produced any books or records, and did not at any time testify under oath, and was never compelled to testify or give any information against himself or anyone else under oath or otherwise and that each of said hearings complained of was recessed shortly after the defendant interposed his plea of immunity.

In support of said motion the Government attaches hereto, marked Exhibit "A", an affidavit in opposition to the plea in bar and application for production of transcript of evidence made by C. W. Aston, who was present at each of said hearings complained of, and who under oath makes this statement concerning said hearings as set forth in the affidavit, which affidavit is made a part of this motion.

Wherefore, premises considered, the Government prays that the plea in bar be stricken, and held for naught.

Chas. E. Dierker, United States Attorney; John Brett, Assistant United States Attorney.

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EXHIBIT "A" TO MOTION TO STRIKE

Opposing Affidavit to Plea in Bar and Application for Production of Transcript of Evidence

STATE OF TEXAS,
County of Tarrant, ss:

C. W. Aston, being duly sworn, deposes and says that he [fol. 48] is an attorney of the Securities and Exchange Commission, duly appointed according to law.

Affiant states that on or about April 18, 1938, the defendant Hiram R. Edwards, accompanied by his attorneys, J. Forrest McCutcheon of Oklahoma City, Oklahoma, and Arthur Heemann of Fort Worth, Texas, appeared before an officer of the Securities and Exchange Commission at its office situated at 103 United States Courthouse, Fort Worth, Texas, pursuant to certain subpoenas duces tecum theretofore served on Hiram R. Edwards by an officer of said Commission.

That pursuant to the aforesaid subpoenas duces tecum the defendant Hiram R. Edwards accompanied by his aforesaid attorneys appeared before an officer of said Commission at its office situated at 103 United States Court house, Fort Worth, Texas, on April 19, 1938.

That pursuant to the aforesaid subpoenas *decus* tecum the said defendant appeared on May 3, 1938, before an officer of the Securities and Exchange Commission at Oklahoma City, Oklahoma, in the Grand Jury Room of the United States Courthouse in said City accompanied by his attorney, J. Forrest McCutcheon.

That the three above mentioned occasions are the only times that the defendant Hiram R. Edwards appeared before an officer of the Securities and Exchange Commission pursuant to the aforesaid subpoenas duces tecum and that affiant participated in and was present throughout the proceedings on each of the three occasions mentioned.

That upon each occasion above referred to the defendant produced the books and records called for in the aforesaid subpoenas duces tecum and stated that he claimed his immunity against self-incrimination in tendering said books and records and in testifying at said proceedings.

Affiant states in this connection that the books and records produced by the defendant pursuant to the aforesaid subpoenas duces tecum were never received, accepted or examined on any of the three occasions mentioned above or at any other time by the Securities and Exchange Commission or any officer of said Commission.

Affiant further states that the defendant Hiram R. Edwards did not testify under oath and that said defendant [fol. 49] was never sworn or placed under oath by an officer of the said Commission or any one else on any of the three occasions above mentioned.

Affiant specifically states that the defendant Hiram R. Edwards was not compelled to testify or give any information against himself or anyone else under oath or otherwise and that the proceedings on each of the three occasions mentioned above were recessed shortly after the defendant interposed his plea of immunity.

C. W. Aston, Affiant.

Subscribed to before me this 25th day of February, 1939. Lois Newam, United States Commissioner, Northern District of Texas. (Seal.) A True copy: Lois Newam, United States Commissioner, Northern District of Texas.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE OPPOSING AFFIDAVIT TO PLEA IN BAR—Filed March 1, 1939

Comes now Hiram R. Edwards, one of the defendants in the above entitled and numbered cause, and would respectfully show unto the Court that he has heretofore filed herein his plea in bar to prosecution and that the United States of America, Plaintiff, has filed its motion to strike said plea in bar and has attached thereto an affidavit of C. W. Aston, an attorney of the Securities and Exchange Commission, which said defendant respectfully moves the Court that said affidavit should be stricken and held for naught for the reason that same is not a proper part of plaintiff's said motion to strike, the reception of same not affording this defendant the right of cross-examination of said affiant and said affidavit being wholly incompetent to establish the facts attempting to be established by the plaintiff herein.

J. Forrest McCutcheon, Attorney for Defendant, Hiram R. Edwards.

[File endorsement omitted.]

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IN UNITED STATES DISTRICT COURT

ORDER OVERRULING DEMURRER, ETC.—March 1, 1939

On this 1st day of March, 1939, parties appeared by their respective counsel, and the defendant Hiram R. Edwards asks and is granted leave to withdraw his plea of not guilty [fol. 50] and presents his demurrer to the indictment. It is ordered by the Court that said demurrer be overruled and exceptions allowed. It is further ordered that the plea in bar and application of the defendant Hiram R. Edwards for the production of the transcript of evidence be overruled and exceptions allowed. It is further ordered that the motion of the plaintiff to strike the plea in bar, the objections to the production of the transcript of evidence and the motion of the defendant Hiram R. Edwards to strike the opposing affidavit to the plea in bar be each overruled and exceptions allowed the respective parties. The defendant Hiram R. Edwards re-enters his plea of not guilty as charged in the indictment.

IN UNITED STATES DISTRICT COURT

ARRAIGNMENT OF HIRAM R. EDWARDS AND R. B. BINGER

On this 17th day of December, 1938, the defendants each appear by their attorney, are duly and legally arraigned upon the indictment herein, and each enters his plea of not guilty as charged therein without prejudice to the right to plead to the indictment.

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IN UNITED STATES DISTRICT COURT

PLEA OF NOLO CONTENDERE OF HIRAM R. EDWARDS

On this 25th day of October, 1939, the defendant appears in person and by counsel, and asks and is granted leave to withdraw his plea of not guilty, and enters plea of nolo contendere to each count of the indictment. Thereupon, it is ordered by the Court that finding of guilt and sentence of said defendant be continued to January 1, 1940, and said case is referred to the Probation Officer for investigation. It is further ordered that the defendant be permitted to stand on his present appearance bond.

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IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT

On this 29th day of January, 1940, came the United States Attorney, and the defendant, Hiram R. Edwards appearing in proper person, and by J. Forrest McCutcheon and J. D. Lydick, his attorneys, and

The defendant having been convicted on his plea of nolo contendere to the offenses charged in the indictment in the above-entitled cause, to-wit: Using United States Mails in sale of certain securities with intent to defraud without hav- [fol. 51] ing in effect a registration statement, filed with the Securities and Exchange Commission; and Conspiracy in using the United States mails in furtherance of scheme to defraud; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It is By The Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the penitentiary type to be designated by the Attorney General or his authorized representative for the period of three (3) years from date of delivery on each of the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh counts of the indictment, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that sentences of confinement herein shall run concurrently.

It is further ordered that service of commitment herein be stayed to March 4, 1940, and the defendant is permitted to stand on his present appearance bond.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Edgar S. Vaught, Judge.

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IN UNITED STATES DISTRICT COURT

ORDER OF DISMISSAL OF DEFENDANT R. B. BINGER

On this 29th day of January, 1940, on motion of the United States Attorney, it is ordered by the Court that said cause be dismissed as to the defendant R. B. Binger on his plea of nolo contendere to the indictment, and said defendant is discharged and his bond exonerated.

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IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL UNDER RULE III—Filed February 3, 1940

Name and Address of Appellant: Hiram R. Edwards, 400 North Ewing Street, Dallas, Texas.

Name and Address of Appellant's Attorney: J. Forrest McCutcheon, 800 Perrine Building, Oklahoma City, Oklahoma.

[fol. 52] Offense: Violation of Securities Act of 1933; violation of Section 338, Title 18, United States Code; and Violation of Section 88, Title 18, United States Code.

Date of Judgment: January 29, 1940.

Brief Description of Judgment or Sentence: Three years in the United States Penitentiary at Leavenworth, Kansas, on each count, the same to run concurrently.

Name of Prison Where Now Confined, If Not on Bail: On bail.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above mentioned on the grounds set forth below.

Hiram R. Edwards, Appellant. J. Forrest McCutcheon, Attorney for Appellant.

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GROUNDS OF APPEAL

I

That the Court erred in overruling the demurrer to the Indictment and as to each count thereof, for the reasons therein stated.

II

That the Court erred in overruling appellant's plea in bar to the prosecution and in refusing to compel the Government to produce a transcript of the proceedings before the Securities and Exchange Commission in which appellant testified under oath, pursuant to subpoena and under compulsion, for the reasons stated in appellant's said plea in bar and motion.

III

That the judgment of the Court is contrary to law.

J. Forrest McCutcheon, Attorney for Appellant.

[File endorsement omitted.]

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[The statement of points relied on, filed in the District Court, is similar to the statement appearing at page 1, and therefore is not printed here.]

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[fols. 53-54] [Bond on appeal in the sum of $2,500, with appellant as principal and Albert Brown, et al. as sureties, approved by the District Judge, was filed on February 24, 1940.]

Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 55] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER OF SUBMISSION—June 19, 1940

This cause came on to be heard and was argued by counsel, J. Forrest McCutcheon, Esquire, appearing for appellant, Charles E. Dierker, Esquire, appearing for appellee.

On motion, affidavit of John Brett and official reports of proceedings before Securities and Exchange Commission in the matter of Edwards Petroleum Company et al., dated April 18, 1938, April 19, 1938, and May 3, 1938, were received and filed over objection of appellant.

Thereupon the cause was submitted to the court.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

AFFIDAVIT OF JOHN BRETT—Filed June 19, 1940

STATE OF OKLAHOMA,
Oklahoma County, ss:

John Brett, of lawful age, being first duly sworn upon oath, deposes and says that he is and was Assistant United States District Attorney on March 1, 1939, on which said date there came on for hearing before Honorable Edgar S. Vaught, United States District Judge in and for the Western District of the State of Oklahoma, the defendant's plea in bar and application for production of transcript of evidence, the plaintiff's motion to strike the plea in bar, and the defendant's motion to strike the government's opposing affidavit to the plea in bar, in the above entitled case; that at the time said matters came on for hearing before Judge Vaught, affiant says that counsel for the government of the United States stated to the Court that they had the transcripts of the record in the proceedings which occurred in Fort Worth, Texas, on April 18, 1938, and April 19, 1938, and on May 3, 1938, at Oklahoma City, Oklahoma, and if the government's affidavit was not sufficient the government would offer them in evidence if the Court desired to examine

them; that upon being so advised, His Honor, Judge Vaught, stated that he did not car- to see the transcripts, that he [fol. 56] did not need them to pass upon the said plea in bar, and that he was going to overrule the defendant's plea in bar.

That the Government of the United States, in presenting the said case to His Honor, Judge Vaught, at the time of the plea of nolo contendere, did not use any of the transcripts of the purported testimony of the defendant, Hiram R. Edwards, or any statement of the defendant, taken at the times of said investigations, as hereinbefore set forth.

That the United States has not at any time in the preparation of this case or at any stage of the proceedings, including said three investigations hereinbefore set forth, ever had access to, much less the custody of, the books and records of the defendant, Hiram R. Edwards, kept by him personally or for and in connection with the operation of the said common law trusts herein involved.

Further affiant saith not.

John Brett, Affiant.

Subscribed and sworn to before me this 15th day of June, 1940. Erling W. Barker, Notary Public. My commission expires 7-14-40. (Seal.)

[File endorsement omitted.]

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Before the Securities ane Exchange Commission

In the Matter of Edwards Petroleum Company, H. R. Edwards, Both Individually and as Trustee; Roger Binger, Lucky Indian Trust, Edwards Indian Chief Trust, Indian Chief Additional Development Trust, Indian Chief Production Lease Trust, and Edwards Combined Trust.

Federal Building, Room 103, Fort Worth, Texas.

Met, pursuant to notice of Commission.

Before C. W. Aston, Trial Examiner

Appearances:

C. W. Aston, Trial Examiner, Fort Worth, Texas, Appearing for the Commission. J. Forrest McCutcheon, First

National Building, Oklahoma City, Oklahoma, and Arthur Heeman, Fort Worth National Bank Building, Fort Worth, Texas, Appearing for Respondent, H. R. Edwards.

[fol. 57] PROCEEDINGS

The Examiner: Gentlemen, you are advised that this is a continuation of an investigation in the Matter of Edwards Petroleum Company, H. R. Edwards, both individually and as Trustee. Roger Binger, Lucky Indian Trust, Edwards Indian Chief Trust, Indian Chief Additional Development Trust, Indian Chief Production Lease Trust, and Edwards Combined Trust.

It is being conducted pursuant to orders of the Secur-ties and Exchange Commission, dated May 29, 1936, and February 28, 1938.

I will state for the record that the proceedings this morning are being conducted in the office of the Securities and Exchange Commission, 103 United States Court House, Fort Worth, Texas.

For the information of the reporter this investigation is confidential, all stenographic notes in connection therewith must be submitted to the Examiner. The reporter is to make an original and three copies of the transcript, the original and two copies of the transcript are to be submitted to the Fort Worth office of the Securities and Exchange Commission; the fourth copy is to be submitted by the reporter to the contract reporter, Electreporter, Inc., Stoneleigh Court Building, 1706 L Street, N. W., Washington, D. C.

Without specific approval of the Commission, copies of the transcript may not be sold or made available to anyone other than the Commission.

Q. (To Mr. H. R. Edwards, Respondent.) Mr. Edwards, you are appearing pursuant to a certain subpoena or subpoenas duces tecum served on you in the Black Hotel, Oklahoma City on April 12, 1938, are you not?

Mr. Forrest McCutcheon: As counsel, Mr. Edwards refuses to testify without being sworn.

Comes now H. R. Edwards, Respondent, in the above matter, and makes demand on the Securities and Exchange Commission for a copy of the transcript of this hearing, for which he tenders payment of the cost thereof.

Mr. Aston: Of course your tender is not anticipated to be made until the transcript has been set up and made in form. [fol. 58] I will state in answer to the statement made by Mr. McCutcheon that the reporter is instructed to not make available for sale or loan a copy of the transcript of this proceedings to Mr. Edwards, or to his counsel, unless approval is obtained first from the Securities and Exchange Commission. I will further state that, as Examiner, I am not authorized to grant the request of counsel for respondent as to making available a copy of the transcript of the proceedings in this matter.

Mr. McCutcheon: Note exception of Mr. Edwards, the Respondent here.

Mr. Aston: The questions to be propounded to you at this time, Mr. Edwards, will be strictly limited to an identification of the books and records produced and books and records called for in the subpoena duces tecum served upon you on April 12, 1938, in the Black Hotel, Oklahoma City. With that explanation, do you now solemnly swear that you will fully and truly, to the best of your ability, identify for this record any and all books and records which you have produced pursuant to such subpoenaes and true explanation make of any failure on your part to produce such books and records or any part thereof and any failure on your part to fully comply with such subpoenaes?

Mr. McCutcheon: Let the record show:

Mr. Edwards, in answer to counsel's question, you have, pursuant to subpoenas duces tecum served on you in the Black Hotel in Oklahoma City, as Trustee, or asking you to bring books and records of the Lucky Indian Trust, Edward Indian Chief Trust, Indian Chief Additional Development Trust, Indian Chief Production Lease Trust and Edwards Combined Trust, you have brought to room 103 in the Federal Building at Fort Worth, Texas, at this time, and have here with you, all of the books and records asked for in said subpoenas duces tecum that you have available, have you?

A. Yes, sir.

Q. Mr. Edwards, then in answer to counsel's question, put before mine, in the identification of these books and records, and in any testimony that you give here at this hearing, and in the production of any and all such books, records and other documents which you have brought here, do you claim your privilege against self-incrimination, as provided for by

[fol. 59] the Securities Act of 1933, laws of the United States and Constitution of the United States?

Mr. Edwards: I certainly do.

Mr. Aston: I would like to clarify your statement, Mr. McCutcheon, for my own information as well as for the record.

I understand that you have instructed your client, Mr. Edwards, the Respondent, in this matter, to claim his constitutional rights?

Mr. McCutcheon: It was a question, I have not instructed him anything, and I asked him a question, and he did.

Mr. Aston: I am sorry, I misconstrued that. I did not understand; he does now claim his constitutional right as well as the privilege granted under the statute with respect to producing at this time the books and records specifically called for in subpoena duces tecum served upon him; I am limiting this to the production only of the books and records specifically described in the subpoenas, am I correct in that assumption?

Mr. McCutcheon: I believe the record will speak for itself as to what I asked him.

Now if I may, Mr. Aston:

Q. Mr. Edwards, in the books and records, documents and other papers that you have brought here this morning and that are here in this hearing, pursuant to the subpoenas heretofore referred to and served upon you, are there entries therein referring to your own personal business and which are so commingled and intermingled with the business of the various trusts, that an inspection and audit of these books and records would, on its face, show your own personal business?

A. Absolutely.

Mr. Aston:

Q. You mean by that your own personal affairs, apart and separate from the trust affairs?

A. I mean by that that my own personal business, particularly my bank accounts, are all run in together along with the books and records of the trust.

Mr. McCutcheon:

Q. You have had these books audited?

A. Yes.

Q. Now, is it possible for an auditor or examiner to go [fol. 60] through your books and records of the trusts that are in question here, without seeing right on its face your own personal individual records and accounts?

A. No, they could not, because they are all together.

Mr. Aston: Would it be possible to separate or segregate from the books and records of the trusts your own private records, records of your own personal transactions?

A. Well, yes, you would have to get an auditor and spend some time doing it.

Q. I am asking or speaking of the records you have here this morning, could you segregate from them or take out from any of those records only your own personal, records of your own personal business and affairs so that you could have separately the books and records of the trusts?

A. I could take them out, but like I say, it would take me some time to do it.

Q. The subpoenas do not call for the production of any private books nor records.

A. The notice for producing these books gave such a short time it was impossible to segregate them.

Mr. McCutcheon: To segregate your personal records wouldn't it require a deletion of the books and records, a tearing up of them and reconstructing a new set of books, is that right?

A. Yes, sir.

Mr. Aston: In other words, the records you have here are records of your trust affairs and your personal affairs and they are so intermingled that you could not segregate one from the other without setting a new set of books and records, is that right?

A. That is right; as far as the income from different trusts, that is separate.

Q. The record of the income of the various trusts is separate?

A. Yes, sir, separate, but the manner in which it was handled through the banks and the manner in which the different bills and obligations were paid is all run together with my personal business.

Mr. McCutcheon: Mr. Edwards, in the prosecution of your development campaign and the drilling of various [fol. 61] wells that are in question in these various trusts,

I will ask you whether you put in a lot of your own personal money?

A. I did.

Q. And do those personal matters, personal refunds to you reimbursements and payments, are they all commingled in these books, is that correct?

A. That is correct.

Mr. Aston: Mr. Edwards said a minute ago that he claimed his constitutional right and statutory right, and any other right he might have, in any testimony he might give in this case, you do not mean to say that the questions which you have just now been propounding to him and trying to clarify that up to this point, that he is claiming any constitutional right?

Mr. McCutcheon: He claims immunity from the time he claimed it, including every bit of testimony that he has now given and any that he shall hereafter give.

Mr. Edwards: That is right.

Mr. McCutcheon: You will have to claim your own immunity?

A. Yes, sir, I have already done that.

Mr. Aston: And to get the record straight and clarify matters to whosoever inspects this at any subsequent time or review this matter, the attorney for Respondent himself has been seeking to clarify these matters and answers thereto; and questions of the attorney for Respondent were not propounded by the Examiner and questions as propounded by the Examiner will be reflected in the record. I have this one question.

Q. Mr. Edwards, do you refuse now to produce the books and records which have been subpoenaed?

Mr. McCutcheon: I think Mr. Edwards should be advised of the law.

Mr. Aston: I thought you had already told him that.

Mr. McCutcheon: I think he should be advised on the statute with reference to that.

Mr. Aston: I assumed counsel had already done that.

Mr. McCutcheon: I had not even talked to him.

[fol. 62] Mr. Aston: For the benefit of the Respondent, I will state that it is the practice of the Commission, and I desire, Mr. Edwards, to call your attention to your constitutional and statutory rights, and in that connection advise you that you may refuse to answer any question or

questions which may be asked you during this proceeding, on the grounds that same may tend to incriminate you and subject you to penalty or forfeiture.

Mr. Edwards: I have my books and records here.

Mr. Aston: Do you understand that statement?

Mr. Edwards: Yes, sir.

Mr. Aston: Do you refuse to produce your books and records specifically called for in this subpoena, on the ground that same may tend to incriminate you, is that the basis of your objection or your refusal to produce them?

A. Yes. I refuse on the ground that if I do produce them I am going to stand on my constitutional rights and ask for immunity.

Mr. Aston: Before we go any further in this matter—Mr. McCutcheon, we have already elicited from Respondent an affirmative statement that he is going to stand on his constitutional rights in this matter, and I am going to refuse any further questions by counsel for Respondent to Respondent that would tend to put the Respondent in position to say that he has been ordered to testify or that he has testified yet, still claiming his constitutional rights.

Mr. McCutcheon: We will stand on the record.

Mr. Aston: For the purpose of the record I would like to clarify the point that subpoenas served on Mr. Edwards were returnable in the office of the Securities and Exchange Commission, 103 United States Court House, Fort Worth, Texas, at 10 o'clock A. M., April 14, 1938. Mr. McCutcheon, of Oklahoma City, attorney for Respondent, Edwards, calls the Examiner over long distance telephone from Oklahoma City on April 13th and requested that subpoenaes be made returnable at some date subsequent to April 14th in order to give Edwards additional time to assemble the books and records, and also for the reason that Mr. McCutcheon was ill. It was agreed between the Examiner and Mr. Mc-
[fol. 63] Cutcheon that Edwards be permitted to appear pursuant to subpoenas on this day, April 18, 1938, in lieu of April 14, 1938; that is correct, is it not, Mr. McCutcheon?

Mr. McCutcheon: That is correct.

Mr. Aston: Gentlemen, I am going to recess this investigation until 10 o'clock tomorrow morning, April 19, 1938. We will stand at recess until tomorrow morning at 10 o'clock.

Mr. McCutcheon: The same subpoenas duces tecum heretofore served on Mr. Edwards are still in effect?

Mr. Aston: That is right.

Hearing recessed until 10 o'clock A. M., April 19, 1938.

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Met Pursuant to Recess or Adjournment on April 18th

Before O. H. Allred, Trial Examiner

Appearances:

O. H. Allred, Trial Examiner, C. W. Aston, Fort Worth, Texas, Attorney for the Commission. R. F. Milwee, Jr., Fort Worth, Texas, Attorney for the Commission.

J. Forrest McCutcheon, First National Building, Oklahoma City, Oklahoma, and Arthur Heeman, Fort Worth National Bank Building, Fort Worth, Texas, Appearing for Respondent, H. R. Edwards.

Proceedings

Examiner Allred: Let the record show this is a continuation of a former investigation recessed on yesterday until 10 o'clock today, and being an investigation ordered by the Securities and Exchange Commission under date May 29, 1936, and supplemental order dated February 28, 1938.

Mr. Reporter, I would like for you to note that O. H. Allred is sitting as an Examiner in this matter this morning and that there are present as attorneys for the Commission, Mr. C. W. Aston, of Fort Worth, and Mr. R. F. Milwee, Jr., of Fort Worth, and that the appearances for the Respondent, H. R. Edwards, are Mr. J. Forrest McCutcheon, First National Building, Oklahoma City, and Mr. Arthur Heeman, Fort Worth National Bank Building, Fort Worth, Texas.

Are you ready to proceed, gentlemen?

Mr. Aston: Yes.

[fol. 64] The Examiner: Let the record show it is stipulated by and between counsel for the Securities and Exchange Commission and counsel for H. R. Edwards that orders for formal investigation in this matter were duly promulgated by the Securities and Exchange Commission under date of May 29, 1933, and supplemental order dated

February 28, 1938, and that said orders designate O. H. Allred and C. W. Aston and other individuals as officers of the Commission with authority to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of books, papers, correspondence, memoranda or other records deemed relevant or material to the inquiry, and to perform all other duties in connection therewith authorized by law.

Is that satisfactory, gentlemen?

Mr. McCutcheon: The stipulation is agreed to.

Mr. Aston: It is agreeable with counsel for the Commission.

The Examiner: All right, let's proceed.

Mr. Aston: Did the record show the appearance of both of the attorneys for Respondent?

The Examiner: It does and also let it show that Mr. H. R. Edwards is present at this session of the investigation in person.

Mr. McCutcheon: Let the record further show that all of the books and records and documents that he produced at this hearing yesterday morning are in the anti-room ready to be produced, subject to his claim of immunity or other constitutional g-ounds that he might raise.

The Examiner: I take it that is satisfactory.

Mr. Aston: It was stated yesterday by Mr. Edwards in answer to questions propounded by his attorney, Mr. McCutcheon, the books and records of the trusts which were subpoenaed in the matter and which were produced at that time, and as stated by Mr. McCutcheon which was made available are in the anti-room at this time, that the books and records of those trusts contain certain entries and records of Edwards' own personal transactions; the subpoenas duces tecum in this matter which are directed to the various [fol. 65] trusts called for the production only of certain records of the various trusts therein specified, and counsel for the Commission requests that this investigation be recessed until Monday, April 25, 1938, in order to afford opportunity to remove from the trusts records called for in the subpoenas duces tecum any entries or records of transactions therein which are not entries or records of the trusts. Counsel for the Commission further requests that the Examiner direct that the subpoenas duces tecum remain in full force and effect, and that the matter be recessed until

Monday, April 25, 1938, at 10 o'clock a. m. at 103 United States Court House, Fort Worth, Texas.

Mr. McCutcheon: Now comes the Respondent by his attorney J. Forrest McCutcheon and moves the Commission to pay for the cost of the deletion and rewriting of the records of H. R. Edwards in order that only the trusts records may be made available to the Commission, pursuant to counsel for the Commission prior hereto.

The Examiner: The motion of Respondent is overruled for the reason that I do not understand that the Examiner is clothed with such authority as would justify him in incurring or in causing the Commission to be obligated for the expense which would be entailed.

Mr. McCutcheon: In connection with that, Mr. Edwards, are you financially able to do that for the Commission?

Mr. Aston: Are you calling Mr. Edwards as a witness?

Mr. McCutcheon: Yes, he was sworn yesterday.

Mr. Aston: He was not sworn yesterday.

Mr. McCutcheon: Do you want to swear him?

Mr. Aston: I am leaving that to you.

Mr. McCutcheon: Are you able to reconstruct these books, are you able to do it in order to show the trusts records from your own records?

Mr. Edwards: I am not.

Mr. McCutcheon: Now comes the Respondent, H. R. Edwards, through his counsel, J. Forrest McCutcheon, and would respectfully show unto the Examiner that counsel has been advised by the United States District Attorney of [fol. 66] Oklahoma City, Oklahoma, for the Western District of Oklahoma, that he has a report from the Securities and Exchange Commission, or some Government Bureau of the United States, and that he is subject to presentment to a grand jury immediately, and that in his opinion he will be indict*ment*, therefore, since the case reposes in the state of Oklahoma, the Examiner is respectfully requested to transfer and move this hearing to some designated point in Oklahoma in the jurisdiction where Mr. Edwards resides, that is in the Western District of Oklahoma, for further hearing.

The Examiner: Does counsel care to comment on this last suggestion?

Mr. Aston: Counsel for the Commission has no objection whatever as to transferring a continuation of this matter

some designated place in Oklahoma which would be more convenient to Respondent in this matter.

The Examiner: Let the record show that the Examiner sustains the motion of Mr. C. W. Aston, counsel for the Commission and that counsel for Respondent has stated that same is agreeable to him and that the investigation is hereby recessed until Tuesday, April 26, 1937, at 10 o'clock a. m. in the grand jury room of the United States Court House at Oklahoma City, with the understanding that subpoenas heretofore issued and served in this matter will remain in full force and effect.

We will stand at recess until the time and at the place named.

(Whereupon the hearing was recessed.)

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Room 709, Federal Building, Tuesday, May 3, 1938

Oklahoma City, Oklahoma

Met, pursuant to notice of the Commission at 10:10 o'clock a. m.

Before R. F. Milwee, Jr., Trial Examiner

Appearances:

C. W. Aston, Attorney for the Securities and Exchange Commission, Ft. Worth, Texas. J. Forrest McCutcheon, Attorney for H. R. Edwards and all Respondents except Roger B. Binger.

[fol. 67] Proceedings

The Examiner: For the purpose of the record I will state that this is a continuation of an investigation which was ordered by the Securities and Exchange Commission, Washington, D. C., at a regular session of that body on the 28th day of February, 1938, for the purpose of determining whether Edwards Petroleum Company, H. R. Edwards, both individually and as trustee, Roger B. Binger, Lucky Indian Trust, Edwards Indian Chief Trust, Indian Chief Additional Development Trust, Indian Chief Protection Lease Trust, and Edwards Combined Trust, and the Officers, Agents or employees have violated or are about to violate

the provisions of Sections five or 17 of the Securities Act of 1933 as amended.

I also wish to state for the information of the reporter that this is a private investigation and that all stenographic notes in connection therewith should be turned over to the Examiner conducting the investigation and that without the Certificate of Approval of the Commission, copies of the transcript or transcripts may not be sold to any parties other than the Commission.

Mr. McCutcheon: At this time, Mr. Examiner, the respondent Edwards makes request for a copy of the transcript of this proceeding. I would like for you to rule on it.

Mr. Aston: Mr. Examiner, in view of the rules and regulations of the Commission with regard to making copies of transcripts at private investigations available to the respondent or to any other parties, I move the Examiner to refuse, overrule the request of counsel for the respondent at this particular time. It is my opinion that such a request would properly have to be made direct to the Commission.

Mr. McCutcheon: I want to add to my motion, Mr. Examiner, that the respondent Edwards in connection with his motion just made, of course, will expect to pay the proper fee for such transcript.

The Examiner: I will just indicate in the record, Mr. McCutcheon, that will be a matter that will have to be presented to the Commission and I cannot have the reporter make available a copy of the transcript without the order of the Commission.

Mr. McCutcheon: I take it my motion is overruled, then.

[fol. 68] The Examiner: Yes.

Mr. McCutcheon: To which we except.

The Examiner: Are you ready to proceed, Mr. Aston?

Mr. Aston: I am, but on that particular motion made by Mr. McCutcheon may I suggest that Mr. McCutcheon make his request for a copy of the transcript of the proceedings of this matter direct to the Commission and that the Trial Examiner at this time waive passing on this motion. I think it is proper that the motion of the respondent's counsel be made direct to the Commission and not to the officers.

The Examiner: I am not overruling his motion or anything, I am merely stating that is a matter that will have to be presented to the Commission if you want a copy of the transcript.

Mr. McCutcheon: We expect to do that, however, we do t want to be in the attitude of waiving that demand.
The Examiner: You have just made a request for a copy d I stated that is a matter peculiarly up to the Commission make those copies available. You can present that to the mmission and it will show on the report here you have de that request.
Mr. McCutcheon: Pardon me, off the record.

(Thereupon a discussion was had off the record.)

Mr. McCutcheon: At this time, Mr. Examiner, may it be pulated between counsel for the Commission and for the spondent Edwards that this proceeding is a continuation the hearings held at Ft. Worth, Texas, on April 18 and ril 19 pertaining to the same matter under inquiry here lay and that respondent Edwards appears here pursuant the same subpoenaes duces tecum heretofore served on n by an officer of the Commission. May that be agreed on?
Mr. Aston: That is agreeable, yes.
Mr. McCutcheon: May I ask one more question then I will t. I would like to ask Mr. Edwards this question: Mr. wards, in any testimony that you might give at this hear- either orally or documentary or otherwise or in the pre- tation of any books, records or other papers, do you l. 69] claim your immunity against self incrimination as retofore claimed at the previous hearing in this matter?
Mr. Edwards: I certainly do.
Mr. McCutcheon: That is all.
Mr. Aston: Mr. Examiner, for the purpose of the record order to clarify the present status of this investigation h regard to the respondent's appearance at the investi- ion, I might make the following statement for the record: April 18th, 1938, as is shown in the transcript of the pro- dings of that date, Mr. Edwards brought with him to the ceedings at Ft. Worth, Texas, in the office of the Securi- s and Exchange Commission, the books and records of the ious trusts that were subpoenaed on April 12, 1938. It s stated that the records of the various trusts contained ords of his own personal business transactions. The ords, although they were brought to the proceedings at t time, were not accepted. The investigation was re- sed until the following day, April 19, 1938. It was con-

vened again on April 19, 1938, at the offices of the Securities and Exchange Commission at the U. S. Court House at Ft. Worth, Texas, and at that time the respondent Edwards appeared with counsel, J. Forrest McCutcheon and Earl Heemann and brought with him again at that time the books and records of the various trusts subpoenaed. The records, although they were brought to the proceedings, were not accepted at that time for the reason as stated and as is shown in the transcript of the proceedings of that date because it was contended by the respondent, H. R. Edwards, that the trust records contained records of his own personal business transactions. The investigation which was convened on that day, April 19, 1938, was recessed again until April 26, 1938, for the purpose as was stated at that time in the record to afford the respondent Edwards time to delete or separate his personal records from the records of the various trusts which has been subpoenaed on April 12, 1938. On April 25, 1938, it was agreed between Mr. McCutcheon, counsel for Mr. Edwards, and O. H. Allred, an officer of the Commission designated as one of the trial examiners in this matter, that the continuation of this investigation would be postponed until this the third day of May, 1938, and was to be convened in the grand jury room of the Federal Building at Oklahoma City.

Mr. McCutcheon: At that point I want this in the record. [fol. 70] At that point, Mr. Aston, I want the record to show that the request for a continuance came from Mr. Allred, he having stated to counsel for the respondent Edwards that he was engaged in other matters at that time and could not appear and there was no conversation whatsoever between counsel, that is between myself and Mr. Allred with reference to the deletion of the record or the tearing apart of them to segregate the personal entries from the trust entries.

Mr. Aston: I think that is correct, during the long distance telephone conversations between you and Mr. Allred on April 25.

Mr. Aston: Mark that as Commission's Exhibit No. 1.

(The order of the Commission for the investigation in this matter was thereupon marked Commissioner's Exhibit No. 1.)

Mr. Aston: Mr. Examiner, I offer in evidence Commission Exhibit No. 1, same being an original of the order of

the Commission for the investigation in this matter. I would like to stipulate for the record if it is agreeable with counsel for respondent that a certified copy of this original order may be substituted at any time for the original.

Mr. McCutcheon: Oh, yes, that is all right.

Mr. Examiner: Let it be received.

Mr. McCutcheon: That is certainly all right. Mr. Examiner, I want to state for the purpose of the record that the books and records and other documents that Mr. Edwards presented to the Examiner at Ft. Worth at the hearing on April 18 and 19, that the books, records and documents of the various trusts that he had are held in his automobile down on the street. The reason they were not brought up was because of the volume and we wanted to await the ruling of the examiner. They are the same as if in the room, so to speak, and made available.

Mr. Aston: They are made available?

Mr. McCutcheon: Yes, within half a block.

Mr. Aston: Now, with reference to that same point, Mr. Edwards, may I ask whether that the books are in the same condition now that they were when you presented them at the last proceedings in this matter?

[fol. 71] Mr. Edwards: Just the same.

Mr. Aston: The records of your personal transactions and business that you have heretofore stated are contained in the records of the various trusts have not been separated or deleted from the trust records?

Mr. Edwards: No.

The Examiner: I understand the statement of Mr. Edwards that the books and records called for in the subpoenaes are available but they are in the same condition as they were when presented at the last date of the investigation, is that correct?

Mr. Aston: That is as I understood it. Is that correct?

Mr. Edwards: That is correct.

Mr. McCutcheon: I may state this for the record. I am trying to get these preliminaries over. Mr. Edwards, is it possible to separate your personal entries reflecting your personal individual business from the trust business without having an auditor to set up a complete new set of books?

Mr. Edwards: No, it is necessary to set up a complete new set of books.

Mr. McCutcheon: Now I am through.

The Examiner: In view of the position which the respondent has taken in this matter, that is in producing the books and records called for *the in* subpoenaes served on him on April 12, 1938, with the statement that such books contained not only the records of the trusts involved but also certain records of personal and individual transactions of H. R. Edwards, I wish to have the record show that the Commission has not subpoenaed and has not and does not desire the examination of any records save and except those which relate solely to the various trusts named and the subpoenaes, and in order that there may be no misunderstanding, I, as an officer of the Commission designated as such for the purpose of the investigation of this matter now advise the respondent, H. R. Edwards, and his attorney, who is here present, that he may disregard the original subpoenaes dated April 12, 1938, and that the said subpoenaes are hereby dismissed and I will now serve the respondent with entirely new subpoenaes and call particular attention to the fact that the new subpoenaes call for the production only [fol. 72] of certain original books and records of the trusts therein specified or copies thereof. In order that no hardship may be put upon the respondent in complying with the new subpoenaes I invite particular attention to the fact that the new subpoenaes are not returnable until the third day of June, 1938, thus allowing a period of five full weeks in order to comply with the new subpoenaes.

Mr. Aston: Mr. McCutcheon, in view of the matter which you and I discussed at Ft. Worth here some time ago the subpoenaes were made returnable here in Oklahoma City as I understood it would be more convenient to you as well as to Mr. Edwards.

Mr. McCutcheon: We appreciate that if it is not too great an inconvenience to the Commission, and we want to cooperate with you.

Mr. Aston: I understood it would be more convenient to have them returnable here.

Mr. McCutcheon: It would be.

Mr. Aston: I move that the investigation in this matter. Mr. Examiner, be recessed until the third day of June, 1938, and be convened again at that time in the grand jury room of the Federal Building in Oklahoma City.

The Examiner: So ordered.

(Thereupon, at 10:30 A. M. May 3, 1938, the hearing in the above-entitled matter was recessed until the third day of June, 1938.)

Filed June 19, 1940. Robert B. Cartwright, Clerk.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 2078—April Term, 1940

J. Forrest McCutcheon for Appellant.

Charles E. Dierker, United States Attorney, (John Brett, Assistant United States Attorney, was with him on the brief) for Appellee.

Before Phillips and Bratton, Circuit Judges, and Murrah, District Judge

OPINION—June 29, 1940

[fol. 73] BRATTON, Circuit Judge, delivered the opinion of the court:

An indictment containing eleven counts was returned against appellant and a co-defendant. The charges related to the formation of certain business trusts in Oklahoma for the production of oil, the issuance, sale and delivery of units or certificates of beneficial interests in such trusts, the unlawful use of the mails, and the formation of an unlawful conspiracy. The first and second counts charged violations of section 17(a)(1) of the Securities Act of 1933,[1] as amended,[2] the third charged a violation of section 17(a)(2); the fourth charged a violation of section 5(a)(1); the fifth charged a violation of section 5(a)(2); the sixth, seventh, eighth, ninth and tenth each charged a use of the mails in furtherance of the scheme or artifice to defraud, in violation of Section 215 of the Criminal Code;[3] and the eleventh charged the formation of a conspiracy to violate the provisions of the Securities Act and the mail fraud statute, in violation of section 37 of the Criminal Code.[4]

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[1] 48 Stat. 74.
[2] 48 Stat. 881.
[3] 18 U. S. C. A. 338.
[4] 18 U. S. C. A. 88.

A demurrer to the indictment and a plea in bar thereto were severally denied, and a plea of nolo contendere was thereafter interposed. The court found appellant guilty of the offenses charged and sentenced him on each count to a term of three years in the penitentiary with provision that the sentences should run concurrently.

The plea in bar alleged that on three separate occasions, in response to subpoenas duces tecum issued and served upon him, appellant appeared before an officer of the Securities and Exchange Commission with the books and records called for in such process, and despite his claim of immunity against self incrimination and under compulsion testified under oath in respect of his identity and relationship to various trusts and organizations which were the subject matter of this prosecution, and that the evidence adduced by the commission had been transmitted to the Attorney General for criminal prosecution. The prayer was that the court require the commission to produce and submit to him a transcript of his testimony, that he be heard on the merits [fol. 74] of the plea, and that the testimony having been given in such circumstances the prosecution be barred and the charges dismissed. Section 19(a) of the Act empowers the commission to make rules and regulations, and Rule IV, promulgated under such authority, provides that hearings shall be stenographically reported and that the official reporter will furnish transcripts to the parties at such rates as may be fixed by contract between the commission and the reporter. But the act authorizes the commission to conduct investigations and hearings, and the rule is plainly limited to hearings. It has no application to testimony taken in the course of investigations as distinguished from hearings. In re Securities and Exchange Commission, 84 F. (2d) 316, reversed with direction to dismiss on the ground that the cause was moot, 299 U. S. 504; Securities and Exchange Commission v. Torr, 15 F. Supp. 144. While certain allegations in the plea refer to the proceedings before the commission as hearings, it is nowhere alleged that they were hearings. For aught that appears in the plea petitioner may have appeared and testified in the course of an investigation as distinguished from a hearing. In such event he was not entitled to a transcript of his testimony. In re Securities and Exchange Commission, supra; Securities and Exchange Commission v. Torr, supra. Moreover, the rule does not purport to provide that a court shall in a crim-

inal case direct the furnishing of such transcript. At most the prayer that the transcript be furnished was addressed to the sound discretion of the court, and it cannot be said that the court abused such discretion in denying it.

Section 22(c) of the act provides that no person shall be excused from testifying or producing books or documents before the commission or any officer designated by it on the ground that the testimony or documentary or other evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but that no individual shall be prosecuted for or on account of any transaction, matter or thing about which he is compelled to testify, after having claimed his privilege against self incrimination. The burden rested upon appellant to prove that he was served with process requiring him to appear and produce certain books and records relating to the subject matter of the prosecution, that he claimed his immunity against self incrimination, and that despite such claim he was required to testify concerning his identity and relationship to the [fol. 75] trusts and organizations referred to in the indictment. The record fails to indicate that any evidence was offered to sustain these allegations of fact. And in the absence of such evidence the plea was properly denied. Lee v. United States, 91 F. (2d) 326, certiorari denied 302 U. S. 745; Williams v. State, 6 Okla. Cr. 373, 118 Pac. 1006; Robbins v. State, 12 Okla. Cr. 294, 155 Pac. 491; Salyers v. Commonwealth, 118 S. W. (2d) 208.

The demurrer challenged each count in the indictment. Count eleven charged in conventional language a conspiracy to sell the securities and to use the mails in connection therewith in violation of the Securities Act and of the mail fraud statute. That count was attacked on the single ground of failure to charge that the securities were not of the class exempted under section 3 of the Securities Act, as amended. The section provides that the provisions of the title shall not apply to the classes of securities described therein, and that the commission may from time to time add other classes to the exempted categories. The effect of the statute is to except from the scope and operative effect of the title the described classes of securities and others which may be added by the commission. It is clear from the face of the count that the securities described therein do not come within the classes described in the statute. Ordinarily an exception created by a proviso or other distinct or substan-

tive clause of a criminal statute need not be negatived in an indictment. One relying upon such an exception must set it up and establish it. Ledbetter v. United States, 170 U. S. 606; McKelvey v. United States, 260 U. S. 353; Nicoli v. Briggs, 83 F. (2d) 375; Knight v. Hudspeth, (10th) —— F. (2d) ——, decided May 20, 1940. And an indictment charging a conspiracy to violate a statute need not negative an exception contained in such statute either by proviso or other distinct or substantive provision. Manning v. United States, 275 F. 29. We have no difficulty in reaching the conclusion that count eleven charged an offense and was not open to the attack directed against it.

The other counts were challenged on entirely different grounds. But there is no need to explore the questions presented in connection with them as the well recognized rule is that a judgment will not be disturbed on appeal where there was a general verdict or finding of guilt on an indictment containing several counts, some of which are [fol. 76] good and some fatally bad, and the sentences run concurrently and do not exceed that which was properly imposed under the good count or counts. Claassen v. United States, 142 U. S. 140; Haynes v. United States, 101 F. 817; Martholomew v. United States, 177 F. 902, certiorari denied, 217 U. S. 608; United States v. Lair, 195 F. 47, certiorari denied, 229 U. S. 609; Aczel v. United States, 232 F. 652; Little v. United States, 93 F. (2d) 401, certiorari denied, 303 U. S. 644.

The remaining ground of demurrer was that the indictment was not signed by the foreman of the grand jury. It was signed by an assistant United States attorney, and was endorsed "A true Bill, Ernest W. Clarke, Foreman." It is argued that the endorsement is no part of the indictment, that the endorsement fails to show that Clarke was foreman of the grand jury that returned the indictment, and that he may have been foreman of something else. No federal statute has been called to our attention providing that the foreman of the grand jury shall sign an indictment at the bottom thereof, and it has been the settled practice of wide use for the United States attorney or his assistant to sign indictments and for the foreman of the grand jury to sign below the endorsement "A True Bill" on the face of it. While it would have been better practice for the word "Foreman" in the endorsement to be followed by the words "of the grand jury" that was not essential to the validity

of the indictment. United States v. Plumer, 27 Fed. Cas. No. 16,056; State v. Valere, 3 So. 186; Swain v. State, 62 So. 446; State v. Patterson, 90 So. 532; State v. Gilson, 90 S. W. 400; Hall v. Commonwealth, 130 S. E. 416.

We fail to find error. Accordingly the judgment is

Affirmed.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—June 29, 1940

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and [fol. 77] adjudged by this court that the judgment and sentence of the said District Court in this cause be and the same is hereby affirmed; and that United States of America, appellee, have and recover of and from Hiram R. Edwards, appellant, its costs herein.

(On July 11, 1940, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.)

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IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION FOR ORDER DIRECTING CLERK TO FILE PETITION FOR REHEARING AND STAY OF MANDATE AND RECALL THEREOF—Filed July 22, 1940

To the Honorable, the Circuit Court of Appeals for the Tenth Circuit of the United States:

Comes now Hiram R. Edwards, Appellant in the above entitled and numbered cause and respectfully makes application of and moves the Court to direct the Clerk of this Court to file his Petition for Rehearing and Motion for Stay of Mandate herein as of the 12th day of July, 1940, the date that the same was submitted to said Clerk by Appellant for filing, and for his reasons therefor and in connection therewith states as follows:

That a judgment of conviction in the United States District Court for the Western District of Oklahoma was by this Court affirmed and judgment entered on the 29th day of June, 1940, and that thereafter, to-wit, on July 12, 1940, Appellant filed with the Clerk of this Court in Denver, Colorado, twenty-one printed copies, with proper service shown, of his Petition for Rehearing and his Motion to Stay the Mandate pending his filing a Petition for Writ of Certiorari to the Supreme Court of the United States in the event the Petition for Rehearing be denied.

That the filing of said Petition for Rehearing and Motion for the Stay of the Mandate was duly and properly done within ten days after the date of the judgment of this Court, in accordance with the rules of this Court and the Rules of Practice and Procedure promulgated by the Supreme Court of the United States on May 7, 1934, pursuant to the Act of Congress approved March 8, 1934 (28 U. S. C. A. sec. 723 (a).

That notwithstanding the Clerk of this Court returned to [fol. 78] Appellant all copies of his Petition for Rehearing with his letter of transmittal acknowledging the receipt of said Petition for Rehearing on the 12th day of July, 1940, but refused to file the same, his reasons being that Sundays and legal holidays, as provided for in the Rules of Practice and Procedure promulgated by the Supreme Court as aforesaid, to be excluded, were not to be excluded in the computation of time for the filing of such Petition.

Appellant respectfully tenders herewith the twenty-one copies of said Petition for Rehearing and respectfully prays the Court to direct the Clerk of this Court to accept and file the same, and Appellant further prays the Court to recall the Mandate which the Clerk of the Court has sent to the Clerk of the Trial Court and that in accordance with his prayer contained in his said Petition for Rehearing this Court enter an order staying the Mandate in order to permit Appellant to file his Petition for Writ of Certiorari to the Supreme Court of the United States in the event his Petition for Rehearing herein be denied.

Respectfully submitted this 22nd day of July, A. D. 1940, it being hereby certified by Counsel that a true and correct copy of this motion has been this day served on the United States Attorney for the Western District of Oklahoma, at Oklahoma City, Oklahoma, by placing the same in the

United States mail with proper postage and with proper address.

J. Forrest McCutcheon, 801 Perrine Building, Attorney for Appellant.

[File endorsement omitted.]

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IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER GRANTING LEAVE TO FILE PETITION FOR REHEARING, ETC. —July 22, 1940

This cause came on to be heard on the motion of appellant for leave to file twenty printed copies of petition for rehearing and stay of mandate herein out of time, and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said motion be and the same is hereby granted, and that twenty printed copies of appellant's petition for [fol. 79] rehearing and motion for stay of mandate herein may be filed with the clerk of this court instanter, which is accordingly done.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR REHEARING AND MOTION TO STAY MANDATE— Filed July 22, 1940

To the Honorable, the United States Circuit Court of Appeals for the Tenth Circuit:

Comes now Hiram R. Edwards appellant in the above entitled and numbered cause, and respectfully petitions and moves the Court to grant him a rehearing and reconsideration herein of the judgment and opinion of this Court, the same having been entered on the 29th day of June, A. D. 1940, and moves for a stay of the mandate herein, and for reasons and grounds therefor, it is respectfully shown as follows, to-wit:

The Court erred in sustaining the action of the Trial Court in overruling appellant's plea in bar and his application for production of the transcript of evidence taken before the Securities and Exchange Commission.

We submit that the provisions of the Fifth Amendment to the Constitution, providing that "no person * * * be compelled in any criminal case to be a witness against himself," is elementary and we deem it unnecessary to enlarge on that part of the Constitution, however, we respectfully submit that the Court did not give due consideration to that inalienable part of the free rights of the American people as set forth in the document of our forefathers, upon which all of our laws that have been upheld by the courts were based.

Appellant has not had the opportunity of having before him a copy of the opinion of the Court herein, however, taking into consideration some of the questions of the Court at the time of the presentation of the case, we feel that the request and prayer of appellant in his motion before the Trial Court for the production of a true and correct copy of the transcript of his testimony against himself, after having claimed his immunity against self incrimination, under the provisions of Section 22(c) of the Securities Act of 1933, did not require any further proffer of proof.

Appellant requested the court to hear him on the merits of his plea in bar. The court refused that request. Appellant excepted thereto.

[fol. 80] We submit that a second request, a third request, a fourth request or other requests would not have made appellant's position any stronger.

Appellant's plea was verified and the answer of the Government was not sustained by the court. The response was overruled.

We respectfully submit, therefore, in accordance with the brief heretofore submitted, that this Court erred in affirming the judgment of the Trial Court in overruling appellant's plea in bar and the failure and refusal of the Trial Court to receive in evidence a true and correct copy, under proper cross-examination, a transcript of the evidence and testimony of appellant before the Securities and Exchange Commission.

Appellant further says that this Court is in error in having received in evidence the purported affidavit of an Assistant United States Attorney, attempting to show that said transcript was offered by the Government, but refused by the court.

Appellant further says that this Court is in error in having received in evidence the purported transcript of the

testimony of appellant before the Securities and Exchange Commission. The purported transcript was not certified to and counsel for the Government stated to the court that he was not present at the time the same was made and it is not conceivable to us that the same could be received in evidence in the Trial Court or in this Court.

It is likewise difficult for us to see how either of said purported instruments could be received by this Court, without proof of the correctness of the same and with no right of cross-examination on the part of appellant.

Neither of these instruments were in the record and this Court is not such that the same could be a trial de novo. It is surprising that the Government would refuse the appellant the right to test the correctness of such purported transcript and that this Court would receive in evidence de novo a mere affidavit of counsel for the Government.

This procedure may be correct, however, it is respectfully submitted that insofar as the humble experience in the practice of the law of counsel for appellant, it is a new deal innovation of the interpretation of the functions of a Federal Appellate Court.

[fol. 81] It is further respectfully submitted that this Court erred in affirming the judgment of the Trial Court in that the demurrer to the indictment should have been sustained for the reasons set forth therein and as set forth in appellant's brief.

It is further respectfully submitted that this Court erred in affirming the judgment of the Trial Court inasmuch as the judgment of the Trial Court did not find appellant guilty of the offenses charged and the sentence of three years on the eleventh count of the indictment was and is illegal since the same was a charge of conspiracy under the law providing that the maximum punishment therefor, insofar as imprisonment is concerned, be two years.

Wherefore, appellant respectfully prays this Honorable Court to grant him a rehearing and reconsideration herein and that a stay of the mandate be granted, in order that he be permitted to file his petition for Writ of Certiorari to the Supreme Court of the United States, and that he be permitted to file additional briefs or make additional briefs or make additional arguments, in the discretion of the Court.

Respectfully submitted, this 10th day of July, A. D. 1940.

J. Forrest McCutcheon, Attorney for Appellant. 801 Perrine Building, Oklahoma City, Oklahoma.

Certificate of Counsel

I, the undersigned, J. Forrest McCutcheon, attorney and counsel for the above named Hiram R. Edwards, appellant, do hereby certify that the foregoing petition for rehearing is presented and taken in good faith and not for the purpose of delay.

J. Forrest McCutcheon.

[File endorsement omitted.]

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In United States Circuit Court of Appeals

Order Denying Motion for Recall of Mandate—July 22, 1940

This cause came on to be heard on the motion of appellant for the recall of the mandate of this court heretofore issued herein, and was submitted to the court.

[fol. 82] On consideration whereof, *is it* now here ordered by the court that the said motion be and the same is hereby denied.

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In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—July 22, 1940

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

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Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 83] Supreme Court of the United States, October Term, 1940

No. 377

Order Allowing Certiorari—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration and decision of this application.

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Endorsed on cover: File No. 44726. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 377. Hiram R. Edwards, Petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed August 26, 1940. Term No. 377, O. T., 1940.

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FILE COPY



No. 377

# Supreme Court of the United States

OCTOBER TERM, 1940

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HIRAM R. EDWARDS,
*Petitioner,*

vs.

THE UNITED STATES OF AMERICA,
*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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J. FORREST McCUTCHEON,
801 Perrine Building,
Oklahoma City, Oklahoma,
*Attorney for Petitioner.*

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## SUBJECT INDEX (Continued)



## TABLE OF CASES

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## TABLE OF STATUTES

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# Supreme Court of the United States

**OCTOBER TERM, 1940**

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**No. -------**

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HIRAM R. EDWARDS,
*Petitioner,*

vs.

THE UNITED STATES OF AMERICA,
*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI

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*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

### I.

### Summary Statement of Matters Involved.

Your petitioner, Hiram R. Edwards, respectfully shows unto the Court that he was found guilty, after a plea of *nolo contendere,* in the United States District Court for the Western District of Oklahoma, for violation of Sec. 77, e and q, Tit. 15, U.S.C.A.; Sec. 338, Tit. 18, U.S.C.A.; and Sec. 88, Tit. 18, U.S.C.A.; and on the 29th day of January, 1940, was sentenced by the court to serve three years on each count of the indictment, the sentences of confinement to run concurrently, in a penitentiary to be designated by the Attorney General (R. 50-51).

The cause in the trial court was styled "*The United State of America, Plaintiff*, vs. *Hiram R. Edwards, Defendant*," being No. 12,682 on the Criminal Docket of said court (R. 5).

After conviction, petitioner duly appealed from the judgment and sentence of the Trial Court to the United States Circuit Court of Appeals for the Tenth Circuit, the cause there being No. 2078 and styled "*Hiram R. Edwards, Appellant*, vs. *United States of America, Appellee*," which judgment and sentence of the trial court was on the 29th day of June, 1940, affirmed by the Circuit Court of Appeals (R. 76-77).

Petition for rehearing was filed on the 22nd day of July, 1940, (R. 77-78) and overruled by the Circuit Court of Appeals on the 22nd day of July, 1940, (R. 82).

The indictment contains eleven counts, the first and second counts charging the sale of securities in various Oklahoma trusts by use of the United States mails and in connection therewith in employing a device, scheme and artifice to defraud in violation of Sec. 17 (a) (1) of the Securities Act of 1933, as amended, (Sec. 77q, Title 15, U.S. C.A.); the third count charging a violation of Sec. 17 (a) (2) of the Securities Act of 1933, as amended, (Sec. 77q, (a) (2), Title 15, U.S.C.A.); the fourth count charging a violation of Sec. 5 (a) (1), of the Securities Act of 1933, as amended, (Sec. 77e, (a) (1), Title 15, U.S.C.A.); the fifth count charging a violation of Sec. 5 (a) (2), of the Securities Act of 1933, as amended, (Sec. 77e (a) (2), Title 15, U.S.C.A.); the sixth, seventh, eighth, ninth and tenth counts charging a violation of Sec. 338, Title 18, U.S.C.A.; and the

eleventh count charging a violation of Sec. 88, Title 18, U.S.C.A., i. e., a conspiracy with one R. B. Binger to violate the Securities Act of 1933 and the mail fraud statute (R. 5-40).

The indictment was filed in court on the 15th day of November, 1938, and was signed by John Brett, Assistant United States Attorney. The indictment was not signed by the foreman of the Grand Jury, but was endorsed by one Ernest W. Clarke, "*Foreman*" (R. 40).

On December 16, 1938, petitioner filed his demurrer to the indictment (R. 41-43), setting forth in substance that the indictment was fatally defective in that the same failed to charge petitioner with a violation of any valid law of the United States under the Constitution; that the indictment was not signed by the Foreman of the Grand Jury of the Western District of Oklahoma and hence invalid; that each of the counts of the indictment, except the conspiracy count, was defective for the reason that the allegations of fraud and misrepresentations were not properly negatived, which allegations were incorporated by reference in the other counts of the indictment; that Count 3 of the indictment was insufficient and defective for the reason that the allegations therein were made up entirely of conclusions and not based on any fact or facts failing to show wherein the alleged omissions to state material facts necessary to be stated to make the statements made, in the light of the circumstances under which they were made, not misleading; that Counts 4 and 5 of the indictment, charging the sale of securities through the mails and in interstate commerce without having in effect a registration statement filed with the Securities and Exchange Commission, were insufficient

in that it did not appear in the indictment that said securities were of a class required to be registered under the law; and that Count 11 of the indictment, i. e., conspiracy, was insufficient for the same reasons set forth with reference to Counts 4 and 5 of the indictment.

On December 16, 1938, petitioner filed his plea in bar to the prosecution, setting forth in substance that he had been compelled to testify against himself under subpoena and after having claimed his immunity against self-incrimination at a hearing before the Securities and Exchange Commission in connection with the same matters and things which are the basis of the indictment herein and the connection of petitioner therewith, and that by virtue thereof, in accordance with the Constitution of the United States and Section 22 (c) of the Securities Act of 1933, as amended, (Sec. 77 v (c), Title 15, U.S.C.A.), petitioner was immune from prosecution and the government barred therefrom (R. 43-45). Said plea in bar was duly verified and had attached thereto a letter from the General Counsel of the Securities and Exchange Commission dated December 8, 1938, refusing the application of petitioner for a copy of the transcript of the testimony of petitioner in said hearings (R. 45-46).

On February 28, 1939, respondent filed its motion to strike said plea in bar with objection to the production of said transcript, the same having attached thereto an affidavit of an attorney of the Securities and Exchange Commission (R. 46-49).

On March 1, 1939, petitioner filed his motion to strike said affidavit opposing said plea in bar (R. 49).

On March 1, 1939, said demurrer and said plea in bar were presented to the trial court, overruled by the court, and exception taken and allowed (R. 49-50). *The motion of respondent to strike the plea in bar was overruled* and exception allowed (R. 50). Thereafter, on the 17th day of December, 1938, petitioner entered a plea of not guilty (R. 50), but on October 25, 1939, changed his plea of not guilty to a plea of *nolo contendere* (R. 50), and on January 29, 1940, was found guilty by the court and sentenced as above set forth.

Notice of Appeal under Rule III was duly given, (R. 51-52), setting forth the grounds of appeal, and thereafter appeal bond was duly filed (R. 53).

At the time of the argument of the cause before the Circuit Court of Appeals, respondent, by and through its United States Attorney for the Western District of Oklahoma, introduced in evidence and filed the same, *de novo*, over the objection of petitioner, an affidavit of John Brett, Assistant United States Attorney for the Western District of Oklahoma (R. 55-56), and a purported transcript of matters before the Securities and Exchange Commission, which transcript was not signed by the Court Reporter, nor was there any proof of the correctness of same (R. 56-72). This purported transcript was likewise introduced before the Appellate Court, *de novo*, without the right of cross-examination on the part of petitioner and without any proof whatsoever of the correctness or authenticity of the exhibit introduced. *Neither were contained in the record from the trial court.*

The specifications of error and points relied upon in the appeal from the trial court to the Circuit Court of Ap-

peals, and herein involved, in addition to the foregoing objection of petitioner to the introduction of evidence, *de novo*, before the Circuit Court of Appeals, are as follows:

> "1. The court erred in overruling Appellant's plea in bar and application for production of transcript of evidence.
>
> "2. The court erred in overruling the demurrer of Appellant to the Indictment.
>
> "3. The judgment of the court is contrary to law in that the court sentenced Appellant to three years on each count of the Indictment, whereas Appellant was found guilty and convicted of no valid substantive offense charged and the sentence of three years on the Conspiracy Count was and is illegal and invalid."

The Circuit Court of Appeals based its affirmance of the case substantially on the following grounds: (1) That the request of petitioner for the Trial Court to compel respondent to furnish a transcript of the proceedings wherein he alleged that he testified under compulsion before the Securities and Exchange Commission after having claimed his immunity against self incrimination was a matter addressed to the discretion of the court and that the same was not herein abused by the denial of petitioner's prayer and that even though Rule IV of the Rules and Regulations of the Commission, promulgated under Section 19 (a) of the Securities Act of 1933, providing that hearings shall be stenographically reported and that copies thereof shall be furnished to the parties at certain fixed prices and that even though there were references in the plea in bar to the proceedings as hearings, since there was no allegation that they were hearings petitioner was not entitled to have a transcript of his testimony introduced in evidence; (2) that although

petitioner filed his plea in bar setting forth that he had testified under compulsion before the Securities and Exchange Commission, after having claimed his immunity against self incrimination, under the provisions of Sec. 22 (c) of the Act, nevertheless, the record failed to indicate any evidence to sustain such allegations; (3) that the demurrer to the eleventh count of the indictment, i. e., the conspiracy count, which attacked that count on the ground of failure to charge that the securities in question were not of a class exempted under Sec. 3 of the Securities Act, was properly overruled, the Circuit Court holding that such exception need not be negatived in the indictment; (4) that inasmuch as the eleventh count of the indictment, i. e., conspiracy count, was good that it was unnecessary to explore the questions presented in the other counts inasmuch as where the sentences run concurrently and do not exceed that which was properly imposed upon the good count the judgment will stand (the Circuit Court of Appeals wholly failed to take into consideration that the maximum confinement that might be imposed on said good count, i. e., the conspiracy (Sec. 88, Tit. 18, U.S.C.A.), is two years instead of three years, on which petitioner was sentenced to *three years* imprisonment); (5) that while it would have been better practice for the word "Foreman" in the endorsement on the indictment to be followed by the words "of the Grand Jury," the same was not essential to the validity of the indictment, no Federal Statute having been called to the Court's attention providing that the Foreman shall sign the indictment at the bottom thereof instead of endorsing the same on the back thereof simply with the word "Foreman" instead of "Foreman of the Grand Jury."

## II.

### Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals herein as to the first issue presented above in overruling petitioner's plea in bar and application for production of a transcript of evidence involves an important question of federal law and is an erroneous decision on an important question of general law which is in conflict with the weight of authority.

2. The decision of the Circuit Court of Appeals herein as to said first issue is a decision of a federal question in a way probably in conflict with applicable decisions of this Court.

3. The decision of the Circuit Court of Appeals herein as to said first issue is one in direct conflict with the provisions of the Constitution of the United States and the Amendments thereto, the laws of the United States thereunder and the decisions of this Court with reference thereto.

4. The decision of the Circuit Court of Appeals herein, as to the second issue presented above, in overruling the demurrer of petitioner to the indictment, is a decision of a federal question in a way probably in conflict with applicable decisions of this Court and involves an important question of federal law which has not been definitely settled, but should be settled, by this Court.

5. The decision of the Circuit Court of Appeals herein as to the third issue presented above, in affirming the sentence of the trial court wherein petitioner was sentenced to serve three years on conviction of violation of Sec. 88, Tit.

18, U.S.C. A., i. e., conspiracy, is in conflict with the law and the applicable decisions of this Court.

6. The decision and action of the Circuit Court of Appeals herein in receiving in evidence, *de novo*, original exhibits, which were not contained in the record on appeal, so far departs from the accepted and usual course of judicial proceedings and is an erroneous action and decision of an important question of general law, in conflict with the weight of authority, and in a way probably in conflict with applicable decisions of this Court, as to call for an exercise of this Court's power of supervision.

7. The decision and action of the Circuit Court of Appeals herein with reference to the matter next preceding is an action and decision in conflict with the decisions of other Circuit Courts of Appeals for other Circuits, on the same matter.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Tenth Circuit had in the case numbered and entitled on its docket, No. 2078, "*Hiram R. Edwards, Appellant*, vs. *United States of America, Appellee*," to the end that this case may be reviewed and determined by this Court as provided for by the statutes and laws of the United States of America; and that the judgment herein of the said United States District Court for the Western District of Oklahoma and the United States Circuit Court of Appeals for the

Tenth Circuit affirming that judgment, be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated this 20th day of August, 1940.

J. FORREST MCCUTCHEON,
801 Perrine Building,
Oklahoma City, Oklahoma,
*Attorney for Petitioner.*

**Certificate of Counsel**

I hereby certify that I have carefully examined the record and, in the light of its contents, consider the Petition for Writ of Certiorari well founded, and that it is not interposed for purpose of delay.

J. FORREST MCCUTCHEON,
*Attorney for Petitioner.*

# Supreme Court of the United States

**OCTOBER TERM, 1940**

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**No. ------**

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HIRAM R. EDWARDS,
*Petitioner,*

vs.

THE UNITED STATES OF AMERICA,
*Respondent.*

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## BRIEF IN SUPPORT OF PETITION

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### I.

### Opinion of Court Below.

The opinion of the Circuit Court of Appeals was rendered on the 29th day of June, 1940, and is set forth in the record at pages 72-76. We do not understand that the same has as yet been officially reported.

### II.

### Jurisdiction.

(1) The judgment of the Circuit Court of Appeals for the Tenth Circuit, sought to be reviewed herein, is dated and was entered on the 29th day of June, A. D., 1940, (R. 76-77). A petition for rehearing was duly filed in said Circuit Court of Appeals on the 22nd day of July, A. D., 1940,

leave of the court being had therefor, (R. 78-81), and on the said 22nd day of July, A. D., 1940, said Circuit Court of Appeals entered its order denying said petition for rehearing (R. 82).

(2) The statutory provisions which sustains the jurisdiction of this Court is Section 240 (a) of the Judicial Code, Sec. 347, Tit. 28, U.S.C.A.

(3) The cases which it is believed sustain said jurisdiction, among others, are as follows:

*Counselman* v. *Hitchcock*, 142 U. S. 562;
*Boyd* v. *United States*, 116 U. S. 616;
*United States* v. *Mayer*, 235 U. S. 55;
*Whitney* v. *Dick*, 202 U. S. 132;
*Russell* v. *Southard*, 12 How. 139, 158, 159;
*Pointer* v. *United States*, 151 U. S. 396;
*Patton* v. *United States*, 281 U. S. 276;
*Warner* v. *New Orleans*, 167 U. S. 467;
*United States* v. *Gulf Refining Co.*, 268 U. S. 542;
*United States* v. *Young*, 232 U. S. 155.

(4) The decision of the Circuit Court of Appeals affirming the judgment and sentence of the trial court wherein said trial court overruled petitioner's demurrer to the indictment and his plea in bar to prosecution based on averments, duly verified, that he had testified before the Securities and Exchange Commission, pursuant to subpoena and under compulsion after having claimed his immunity against self incrimination pursuant to his Constitutional rights and those as provided for by Section 22 (c) of the Securities Act of 1933, as amended, was a decision and opinion contrary to the great weight of authority, the laws and statutes

and the Constitution of the United States and the applicable decisions of this Court; that the sentence of the court to *three* years imprisonment on the eleventh count of the indictment, i. e., a charge of *consipracy*, (Sec. 88, Tit. 13, U.S.C.A.) was violative of the legal rights of petitioner, contrary to law and in direct conflict with the decisions of this Court; that the reception in evidence by said Circuit Court of Appeals of matter and evidence, *not in the record on appeal*, was an action and decision of the court in conflict with the decisions of other Circuit Courts of Appeals for other Circuits, on the same matter, and such a departure from the accepted and usual course of judicial proceedings and such an erroneous action and decision in conflict with the weight of authorities, the laws of the United States, and in conflict with the applicable decisions of this Court, as to bring the case within the jurisdictional provisions relied upon.

## III.

### Statement of the Case.

The statement of the case has already been summarized and set forth in the preceding petition under I, "*Summary Statement of Matters Involved,*" which, for the sake of brevity, is hereby adopted and made a part of this Brief, the same as if here repeated again in full, however, in addition thereto it is deemed advisable to call attention to the following:

The plea in bar of petitioner, under his oath, in substance alleged that on or about the 14th day of April, 1938, and on two successive times pursuant to subpoenas *duces tecum*, he appeared and testified before an officer of the

Securities and Exchange Commission and after having claimed his immunity against self incrimination, as provided by Section 22 (c) of the Securities Act of 1933, as amended, and the Constitution of the United States, he was immune from prosecution and that by virtue of the foregoing the same should be barred. The plea refers to the "proceedings" as *"hearings"* (R. 43-45).

Petitioner, in said plea in bar prayed the court to require the Securities and Exchange Commission to produce a transcript of his said testimony before said Commission and *that he be heard on the merits of his plea in bar* (R. 45). The Securities and Exchange Commission, by and through its General Counsel, under date of December 8, 1939, advised Counsel for petitioner that the evidence adduced by the Commission had been transmitted to the Attorney General for criminal prosecution and that an indictment had been returned against petitioner and the Commission refused to furnish petitioner with a transcript of his testimony before such hearing (R. 45-46). The trial court refused to hear petitioner on the merits of the plea in bar, and as hereinbefore stated, the plea in bar was overruled by the trial court, to which petitioner excepted (R. 49-50).

Respondent moved to strike petitioner's plea in bar (R. 46-49), *which motion was not granted by the trial court* but was likewise overruled (R. 49-50).

Attention is called to the introduction in evidence by Respondent before the Appellate Court, as an original exhibit, which was not included in the record on appeal, of an affidavit of an Assistant United States Attorney to the effect that the Trial Court refused to receive said transcript

in evidence and that he did not need the same to pass upon said plea in bar and *that without hearing evidence he was going to overrule said plea in bar,* and that at no time did the trial court use the transcript of petitioner's testimony in connection with his action in overruling said plea in bar (R. 55-56).

Respondent, also, introduced in evidence, *de novo,* before the Circuit Court of Appeals, the same not being in the record on appeal, a purported transcript of the testimony of petitioner, as aforesaid (R. 56-72), it not appearing that the same was a true and correct record of such testimony and proceedings, there being no certificate of the Court Reporter shown, and petitioner having no right of cross-examination for the purpose of testing the correctness or authenticity of said exhibit.

Petitioner objected to the introduction in evidence of the foregoing original evidence before the Circuit Court of Appeals, but the same was received by the court nevertheless (R. 55).

## IV.

### Specification of Errors.

(1) The Circuit Court of Appeals erred in holding that petitioner was not entitled to have produced in evidence the transcript of his testimony before the Securities and Exchange Commission, or to be heard on the merits of his plea in bar.

(2) The Circuit Court of Appeals erred in affirming the judgment of the trial court and approving the action of the trial court in overruling petitioner's plea in bar.

(3) The Circuit Court of Appeals erred in affirming the judgment of the trial court and approving the action of the trial court in overruling petitioner's demurrer to the indictment.

(4) The Circuit Court of Appeals erred in affirming the judgment of the trial court as to the sentence of petitioner to imprisonment of *three* years on the eleventh count of the indictment, i. e., *conspiracy,* (violation of Sec. 88, Title 18, U.S.C.A.).

(5) The Circuit Court of Appeals erred in receiving in evidence, *de novo,* over the objection of petitioner, certain exhibits and evidence not included in the record on appeal.

## V.

## ARGUMENT

### Point A

*(Specification of Errors Nos. 1 and 2)*

**The Circuit Court of Appeals erred in affirming the judgment of the trial court wherein petitioner's plea in bar and application to be heard on the merits thereof and to have produced in evidence thereof the transcript of his testimony before the Securities and Exchange Commission was overruled.**

As stated, *supra,* petitioner filed a plea in bar to the prosecution in the trial court, duly verified, alleging that he had appeared before the Securities and Exchange Commission, pursuant to subpoena, and after having claimed his immunity against self-incrimination, testified under compulsion against himself under oath pursuant to various questions propounded by an officer of the Commission concerning his identity and relationship to the matters which were the subject of the prosecution herein (R. 43-46).

Said plea in bar included a prayer seeking to compel respondent to produce a transcript of said testimony and a prayer that he be heard on the merits of the plea in bar (R. 45), which plea in bar and application for production of said transcript and prayer to be heard on the merits of the plea were overruled by the trial court and exception of petitioner allowed (R. 50).

The Circuit Court, with reference to the order of the trial court, in overruling said plea in bar took the view that despite petitioner's claim the record failed to indicate that any evidence was offered to sustain the allegations of fact therein, and in the absence of such evidence the plea was properly denied.

Petitioner's plea in bar was verified and the same fully stated facts compelling the court to order a reply thereto denying the same. The reply of respondent was not granted by the trial court *but was overruled* (R. 50). Thus, we have the verified plea in bar of petitioner, insofar as the trial court's order is concerned, standing unchallenged. Furthermore, the plea in bar prayed the court to be heard on the merits of the plea which was likewise overruled by the court and to which petitioner excepted.

A plea in bar, as in the instant case, where proper request is made for a hearing on the merits thereof, requires the court to hear evidence for the purpose of testing the sufficiency of the averments and allegations contained in said plea, and we respectfully submit that the failure and refusal of the trial court to hear petitioner thereon was reversible error and that the Circuit Court of Appeals erred in affirming the judgment of the trial court with reference thereto.

The affidavit of John Brett, Assistant United States Attorney (R. 55-56), is, in part, as follows, to-wit:

> "Judge Vaught, stated that he did not care to see the transcript, that he did not need them to pass upon the said plea in bar, and that he was going to overrule the defendant's plea in bar."

We submit that petitioner did offer to sustain the allegations in his plea in bar by his prayer in said plea requesting to be heard on the merits of the case and for a production of the transcript of his testimony before the Securities and Exchange Commission.

We say that a second request, a third request, a fourth request or others would not have made the position of petitioner any stronger than the original request and prayer which in substance amounts to a proffer of proof which was overruled by the court and to which order of the court petitioner excepted.

The Fifth Amendment to the Constitution of the United States, among other things, provides that "no person * * * shall be compelled in any criminal case to be a witness against himself."

We feel that it is practically unnecessary to present any lengthened argument pertaining to this portion of the Constitution, as the broad principle therein set forth has been so well passed upon by all of the courts. The principle has always been jealously protected and safeguarded, however, in passing, we respectfully call attention to the language of the Supreme Court in *Counselman* v. *Hitchcock*, 142 U. S. 562, 35 L. ed. 1110, wherein this Court stated:

> "It is impossible that the meaning of the constitutional provision can only be, that a person shall not be

compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."

In *Gouled* vs. *U. S.*, 255 U. S. 296, 65 Law Ed. 648, the Supreme Court of the United States, through Mr. Justice Clarke, stated as follows:

"The part of the 5th Amendment here involved reads:

" 'No person * * * shall be compelled in any criminal case to be a witness against himself.'

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, in *Weeks* v. *United States*, 232 U. S. 383, 58 L. ed. 652, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177, and in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 64 L. ed. 319, 40 Sup. Ct. Rep. 182) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments. The effect of the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizens,—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been re-

peatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly overzealous executive officers."

The Securities Act of 1933, as amended, and particularly Section 22 (c) thereof, (Section 77 v (c) Title 15 U.S.C.A.) provides as follows:

"No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

There can be no question but that the foregoing provision of the Securities Act of 1933, is constitutional and, in fact, there is a long line of authorities holding that under the Fifth Amendment to the Constitution, Congress has the power to grant such immunity and amnesty to persons who appear and testify, under compulsion, in any criminal proceeding.

In the instant case, we have the verified and sworn plea of Petitioner to the effect that he was compelled to appear before the Securities and Exchange Commission on three different occasions and that at said hearings he appeared under subpoena and was compelled to testify against himself and at the same time claimed his immunity against self-incrimination. In his plea in bar Petitioner set forth that he testified under oath to various questions and matters concerning his identity and relationship to the matters for which he was indicted and later found guilty by the court, including matters pertaining to his personal entries, books and records. His plea in bar has attached thereto a letter from the Securities and Exchange Commission stating that said evidence *had been transmitted to the Attorney General for criminal prosecution and that an Indictment had been returned.*

In the plea in bar Petitioner requested that Respondent produce a transcript of Petitioner's said testimony which the Respondent, for some unanswerable reason, objected to producing and feebly attached to their objection an affidavit of one of the attorneys of the Commission—*one of their own attorneys.*

The plea in bar of Petitioner, duly verified, states that he appeared before three *hearings* of the Commission and Respondent, in its motion to strike the plea in bar, in paragraph IV thereof, refers to the proceedings as "proceedings or hearings." (R. 47) Nowhere does Respondent allege or set forth that said proceedings were private investigations but, on the contrary, admits, in substance, that the proceedings were *hearings.*

The Securities Act of 1933 gives the Securities and Exchange Commission the power to make rules and regulations to carry out the provisions of the Act, (Section 77 s (a), Title 15, U.S.C.A.), and pursuant thereto the Commission promulgated the following rule which was in effect at the time of the testimony of Appellant before the Commission:

> "Rule IV. Hearings; Evidence. * * *
>
> (c) Hearings shall be stenographically reported and a transcript thereof shall be made which shall be a part of the record of the proceeding. Transcripts will be supplied to the parties by the official reporter at such rates as may be fixed by contract between the Commission and the reporter."

The Circuit Court of Appeals took the viewpoint that Rule IV, *supra,* had no application to testimony taken in the course of investigations as distinguished from *hearings* and cites as authority therefor the cases: *In re Securities and Exchange Commission,* 84 F. (2d) 316, and *Securities and Exchange Commission* v. *Torr,* 15 Fed. Supp. 144. These were cases wherein the proceedings before the Commission were in fact *investigations* whereas in the instant case the proceedings were referred to as *hearings* and the reference to the proceedings as such was not disputed by Respondent.

It is readily to be seen why a transcript of the proceedings in a *secret investigation* would be withheld, but where the proceeding is one wherein petitioner's counsel is present, as in the instant case (R. 48) then we have an entirely different situation and we respectfully submit that such proceeding is a *hearing* within the meaning of the law and the rules and regulations of the Commission and that, as such,

petitioner was entitled to have produced in evidence a copy of the transcript of his testimony at such hearing as provided for by Rule IV of the rules and regulations of the Commission, and that it was error for the trial court to refuse petitioner's request therefor, in order to give him an opportunity to test the correctness of the purported transcript that might be presented under the proper rules of evidence governing introduction of such documents and instruments, instead of petitioner being at the mercy of the Circuit Court of Appeals in receiving in evidence, *de novo*, a purported copy of the same, uncertified to by the Court Reporter, and with no showing whatsoever that the same was a true and correct copy of what it purported to be as was done here.

We respectfully submit, therefore, that the Circuit Court of Appeals erred in affirming the judgment and sentence of the trial court and in approving the action of the trial court in overruling petitioner's plea in bar and his application to be heard on the merits thereof and to have produced in evidence the transcript of his testimony before the Securities and Exchange Commission in order that his counsel might have the right of cross-examination concerning the same and the right of testing its correctness and authenticity and we respectfully say that the opinion, and the judgment of the Circuit Court of Appeals herein in connection with the foregoing was and is contrary to the law and violative of the Constitutional rights of petitioner and in conflict with the great weight of authority and the decisions of this Court with reference thereto.

**Point B**

*(Specification of Error No. 3)*

**The indictment was invalid and the demurrer of petitioner thereto should have been sustained.**

The indictment charged petitioner in eleven counts with violations of the Securities Act of 1933, as amended, the Mail Fraud Statute (Sec. 338, Tit. 18, U.S.C.A.) and with a conspiracy to violate said laws (Sec. 88, Tit. 18, U.S.C.A.), all as more fully set forth in the petition, *supra.*

The indictment was not signed by the Foreman of the Grand Jury (R. 40). It was indorsed "A True Bill, Ernest W. Clarke, Foreman" (R. 40).

We are not able to ascertain whether the said Clarke was Foreman of the Grand Jury of the Western District of Oklahoma, foreman of the Federal Building, foreman of some W. P. A. project, or what. There is nothing whatsoever to indicate that he was the duly qualified Foreman of the Grand Jury regularly empaneled for the Western District of Oklahoma that presented the purported indictment.

In *United States* v. *Levally,* 36 Fed. 687 (D.C. W.D. Pa.), the court, in passing upon the sufficiency of an indictment wherein the Foreman of the Grand Jury wrote his name across the back of the indictment, held the same insufficient, saying that the same was an "insensible indorsement."

In *Frisbie* v. *United States,* 157 U. S. 160, 39 L. ed. 657, a similar question was presented to the Court, however, in that case the Court held that the objection as raised here by demurrer, came too late to be raised in the Supreme Court. Attention is directed, however, to the following language of the Court:

"There is in the Federal Statutes no mandatory provision requiring such indorsement or authentication, and the matter must, therefore, be determined on general principles. It may be conceded that in the mother country, formerly at least, such indorsement and authentication were essential. 'The indorsement is parcel of the Indictment and the perfection of it.' *King* v. *Ford*, Yelv. 99."

An indorsement on the back of a bill of indictment forms no part thereof. See *Lee Choy* v. *United States*, 293 Fed. 582, (U.S.C.A. Hawaii) and *Wechsler* v. *United States*, 158 Fed. 579 (U.S.C.A. N.Y.).

Counts 1 and 2 of the indictment were and are fatally defective in that the same wholly failed to negative the allegations contained therein.

Count 3 of the indictment, which attempted to charge a violation of Section 17 (a) (2) of the Securities Act of 1933, as amended, is fatally defective in that said count failed to charge wherein petitioner omitted to state material facts necessary to be stated to make the statements made, in the light of the circumstances under which they were made not misleading.

The allegations in the indictment, generally, are that petitioner failed to state the location of certain non-producing oil wells around his property and that, therefore, such omissions constituted an omission of a material fact.

We respectfully submit that the omission to refer to non-productive wells between an anticipated field and other producing oil fields surrounding the anticipated field, has no bearing whatsoever on the question of whether oil will be produced in the anticipated field. This is a well known

fact in the petroleum industry. In fact, the presence of dry holes in a general area, with the knowledge of the various strata passed through, is not only indicative of a producing oil structure; but, in most cases, is the *indicia* of production.

It is a well accepted principle in the petroleum industry that new oil fields are located and found by virtue of the subsurface data obtained from dry holes drilled around the new structure. There is no representation that the well being drilled by petitioner, referred to in the third count of the indictment, was a part of any of the other producing fields, nor was there any representation that all of the pools together was just one oil field. There could be, therefore, no fraud in omitting to make reference to dry holes which were off-structure as it is well established in the Mid-Continent area that said dry holes are helpful in determining whether the location of a new well, such as petitioner was drilling, was on oil bearing structure or not.

Count four of the Indictment charges Petitioner with a violation of Section 5 (a) (1) of the Securities Act of 1933, as amended; (Section 77 c (a) (1) Title 15 U.S.C.A.) and count 5 of the Indictment charges a violation of Section 5 (a) of the Securities Act of 1933, as amended, (Section 77 e (a) (2), Title 15 U.S.C.A.) in the sale of securities, the said counts alleging that said securities were sold and offered for sale "there not then being in effect a registration statement filed with the Securities and Exchange Commission."

Section 5 (a) of the Securities Act of 1933, as amended, (Section 77 c and 77 e, Title 15 U.S.C.A.) prohibits the use of the United States Mail or the use of Interstate Commerce

to sell or offer for sale securities unless a registration statement is in effect, however, Section 3 (b), (Section 77 c (b) Title 15 U.S.C.A.) provides as follows:

> "The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this subchapter with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $100,000."

Pursuant to the foregoing statute, the Securities and Exchange Commission duly promulgated and made effective, as a part of its general rules and regulations, Rule 200, which provides in substance that an offering, as in the instant case, where the aggregate offering price to the public did not exceed the sum of $30,000, no registration is necessary.

This rule was in full force and effect at the time the mails were used by Petitioner in said counts 4 and 5 of the Indictment. The provision of the rule, not exempting certificates of interest in trusts, did not become effective until March 1, 1938, by virtue of the adoption of the Commission of Regulation B-T, which was subsequent to the use of the mails by Petitioner.

Even though Section 5 of the Securities Act of 1933, requires the registration of certain securities, nevertheless Section 3 of the Act exempts from registration certain de-

scribed classes of securities, including those exempted by the Commission under its General Rules and Regulations, where the issue is under the $100,000. Therefore, we respectfully submit that counts 4 and 5 of the Indictment are defective in that there is no allegation that the securities offered by Petitioner were not in the class of securities exempted from registration under Section 3 of the Securities Act of 1933, and the Rules and Regulations of the Securities and Exchange Commission exempting various classes of securities as provided for by Section 3 (b) of said Act.

Rule 200 permitted the sale of securities, without registration up to $30,000, and other rules of the Commission permitted the sale of securities, without registration, upon complying with certain requirements up to $100,000. An allegation, therefore, to the effect that the accused sold securities without registration states no cause of action whatsoever. *It is no violation of the law to sell securities without registration.* The Act exempts certain classes of securities without registration and the rules and regulations promulgated under the Act exempts certain securities from registration and it is respectfully submitted that said counts of the Indictment are fatally defective and wholly fail to state a cause of action without alleging that the securities sold or offered for sale were of a class required to be registered and not exempt under the provisions of the law and the rules and regulations promulgated under said Act.

*It is elementary that securities may be sold and offered for sale without there being in effect a registration statement.*

We submit that the point raised is analogous to that of the decisions of the courts in passing on the validity of indictments under the Harrison Narcotic Act. An indictment simply charging the possession of narcotics is invalid. There must be a charge that the accused was a person who had not registered and *who was required to register under the law.* In the instant case there is no allegation that the securities sold or offered for sale were of a class requiring registration.

See *United States* v. *Gin Fuey Moy,* 241 U. S. 394; *United States* v. *Wilson,* 225 Fed. 82; *United States* v. *Carney,* 228 Fed. 163; *Swartz* v. *United States,* 280 Fed. 115; and *Ex parte McGonigal,* 2 Fed. (2d) 784.

Counts 6 to 10, inclusive, of the indictment charge petitioner with a violation of Section 338, Tit. 18, U.S.C.A., i. e., with having devised a scheme and artifice to defraud and with the use of the mails to effectuate the same (R. 29-36).

The pertinent language of the Mail Fraud Statute and of Section 17 of the Securities Act of 1933 (Sec. 77 q, Tit. 15, U.S.C.A.) are substantially the same.

The mail fraud statute is the prior statute; the Securities Act is the latter one, and we respectfully submit that insofar as the same is applicable to the sale or offer of sale of securities through the United States mails in carrying out and employing a fraudulent scheme as that described in the indictment herein, the provisions of both statutes are substantially the same and that it was the intention of Congress in the amendment to the Securities Act of 1933, insofar as the same applies to the securities in question here, that the Mail Fraud Statute (Section 338, Title 18, U.S.C.A.) was and is repealed.

Attention is directed to the fact that when the Securities Act of 1933 was first enacted, Section 5 (c) thereof provided:

> "The provisions of this Section relating to the use of the mails shall not apply to the sale of any security where the issue of which it is a part is sold only to persons resident within a single state or territory * * *."

and that this provision was repealed in 1934, giving the Securities Act full control of the use of the mails whether interstate or intrastate, thus reflecting that it was the intention of Congress in that amendment that the Securities Act should repeal and supersede the mail fraud statute insofar as the same is applicable to securities of the type and class involved herein.

We realize that the District Court for the Northern District of Texas, in the case of *United States* v. *Alluan, et al.*, 13 Fed. Supp. 289, held that the Securities Act of 1933 did not repeal the mail fraud statute and that the same view was taken by the Circuit Court of Appeals for the Second Circuit in the case of *United States* v. *Rollnick et al.*, 91 Fed. (2d) 911. With the holdings of these two courts, we cannot agree. They may have some persuasive effect, but certainly are not binding and we submit that an analysis of the law can only lead to the conclusion that the mail fraud statute was repealed by implication by the enactment of the Securities Act of 1933.

In the Alluan case, the view is taken by the court that under the mail fraud statute the offense could be committed before any securities were sold and that the violation under the Securities Act was not completed until the sale actually took place. The court further held to the view that the

punishment under the mail fraud statute was for the fraud itself the violation being complete without a sale, whereas, the punishment for the Securities Act was for the fruit of the fraud, requiring an actual sale. Of course, this view is not the law and is erroneous.

Section 17 of the Securities Act, as above quoted, refers to the employment of a device, scheme or artifice to defraud and the use of the mails or interstate commerce to effectuate the same. Section 5 of the Securities Act refers to the use of the mails in the sale of securities and Section 2 (3) of the Act (Section 77 b (3) Title 15, U.S.C.A.) provides that the term "sale" shall include every attempt or offer to dispose of any security, that is, any letter, or writing, going through interstate commerce or the United States mails, just the same as in the mail fraud statute. There need be no actual sale to violate the Securities Act.

Where there are two acts of Congress on the same subject and the last embraces the provisions of the first, insofar as the same is applicable to a particular case before the court, the effect of the subsequent act is that of repealing the prior law by implication. See *United States* v. *Tynen*, 78 U. S. 95, 20 L. ed. 153.

We respectfully submit, therefore, that insofar as counts 6 to 10, inclusive, of the Indictment are concerned, the same charge no violation of any valid and subsisting law of the United States and that the demurrer to said counts should have been sustained by the trial court.

Count 11 of the indictment charges a violation of Section 88, Title 18, U.S.C.A., i. e., a conspiracy by and between Petitioner and one R. B. Binger, to commit violations of the

Securities Act of 1933, and of the mail fraud statute (Section 338, Title 18, U.S.C.A.) in the sale of securities through the mails, and in interstate commerce.

There are no allegations in said count of the indictment to the effect that the securities sold were of a class required to be registered with the Securities and Exchange Commission which, as presented, *supra,* we submit the allegations are too vague and indefinite and do not state a cause of action against petitioner.

**Point C**

*(Specification of Error No. 4)*

**The Circuit Court of Appeals erred in affirming the judgment of the trial court in sentencing petitioner to three years imprisonment on the eleventh count of the indictment, i. e., conspiracy.**

Petitioner was charged and found guilty of a violation of the eleventh count of the indictment and sentenced thereupon to serve three years in a penitentiary to be designated by the Attorney General.

Section 88, Title 18, U.S.C.A., provides that the maximum confinement for violation of this statute is two years instead of three years as petitioner was sentenced.

The Circuit Court of Appeals (R. 75) takes the position, with reference to the eleventh count of the indictment, that since it is a good count, and since petitioner's sentence was to run concurrently with other counts in the indictment, that the sentence of three years on the conspiracy count should stand. The opinion of the Circuit Court of Appeals, after holding that the eleventh count of the indictment was good stated that there was no need to explore the questions presented in connection with the other counts. We respect-

fully submit that the Circuit Court of Appeals erred in affirming the judgment of the trial court wherein petitioner was sentenced to serve three years on each count of the indictment (the same including the eleventh count), the court taking the view that said count was the *good* count of the indictment and the court failing and refusing to explore the questions presented as to the other or *bad* counts of the indictment.

**Point D**

*(Specification of Error No. 5)*

**The Circuit Court of Appeals erred in receiving in evidence, de novo, over the objection of petitioner, certain exhibits and evidence not included in the record on appeal.**

We think the facts with reference to this proposition have been sufficiently stated, *supra,* however, it will be recalled that at the time of the presentation of the argument of counsel herein before the Circuit Court of Appeals, the court received in evidence, over the objection of petitioner (R. 55), an affidavit of an Assistant United States Attorney and a purported transcript of the testimony of petitioner before the Securities and Exchange Commission. These exhibits and this evidence were received by the Circuit Court of Appeals, *de novo,* and neither was included in the record on appeal.

First of all, it is respectfully submitted that an affidavit is not even admissible in the trial court, much less in the Appellate Court, as original evidence. See *Holt* v. *United States,* 94 Fed. (2d) 90, (C.C.A. 10th). Neither was the purported transcript admissible, which was not a part of the record on appeal, there being no test made of its correct-

ness or authenticity and the same wholly failing to show that it was certified to by the Court Reporter.

Section 212, Title 28, U.S.C.A. (Sec. 117 of the Judicial Code) provides as follows:

> "There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, which shall be a court of record, *with appellate jurisdiction,* as hereinafter limited and established."

It has been repeatedly held that the Circuit Court of Appeals has no original jurisdiction and that its jurisdiction is appellate only, except in such cases as may be necessary to carry out such appellate jurisdiction. See *Whitney* v. *Dick,* 202 U. S. 132; *United States* v. *Mayer,* 235 U. S. 55; *Travis County* v. *King Iron Co.,* 174 U. S. 801; *Fowler* v. *Seymour,* 95 Fed. (2d) 627 (C.C.A. 9th 1938); *Millers Mut. Fire Ins. Ass'n* v. *Warroad Potatoes Growers Ass'n,* 94 Fed. (2d) 741 (4th C.C.A., 1938); *Hill* v. *Douglass,* 78 Fed. (2d) 851 (C.C.A. 9th 1935).

In *Hall* v. *United States,* 78 Fed. (2d) 168 (10th C.C.A. 1935), the same Circuit Court of Appeals, from which a review is sought herein, stated as follows:

> "*The jurisdiction of the Circuit Courts of Appeals is purely appellate, and they have no original jurisdiction* except such as is necessary to aid, protect, or enforce their appellate jurisdiction. *United States* v. *Mayer,* 235 U. S. 55, 65, 35 S. Ct. 16, 59 L. Ed. 129; *Frankel* v. *Woodrough* (C.C.A.) 7 F. (2d) 796, 797; *Whitney* v. *Dick,* 202 U. S. 132, 137, 26 S. Ct. 584, 50 L. Ed. 963. For us to entertain a motion for a new trial filed in the District Court, would be to exercise original, not appellate, jurisdiction.

"The proper procedure is indicated in *Roemer* v. *Simon*, 91 U. S. 149, 150, 23 L. Ed. 267, where the court said: 'It is clear, that, after an appeal in equity to this court, we cannot, upon motion, set aside a decree of the court below, and grant a rehearing. We can only affirm, reverse, or modify the decree appealed from, and that upon the hearing of the cause. *No new evidence can be received here.*" (Italics supplied).

Attention is also directed to the language of the Court of the Fourth Circuit Court of Appeals in *Stephenson* v. *Equitable Life Assur. Soc.* v. *United States*, 92 Fed. (2d) 406, wherein the court had to say at page 410:

"As the judge below did not pass upon the merits of the case but dismissed it for lack of jurisdiction, and there is no assignment of error relating to the merits, we cannot pass upon the merits here. In reversing the dismissal on the jurisdictional point there is nothing that we can do but remand the cause for further proceedings. We have been urged to interpret the incontestable clause of the policy; but our powers are solely those of an appellate court, and we can pass on the merits of a cause only by way of review."

See also *Chisholm-Ryder Co., Inc.* v. *Buck*, 65 F. (2d) 735 (C.C.A. 4th 1933).

We respectfully submit, therefore, that the Circuit Court of Appeals erred in receiving and considering in evidence, *de novo*, the foregoing evidence, none of which was included in the record on appeal, and none of which was admissible, neither in the trial court nor in the Appellate Court.

The statutes and the authorities are clear that the Circuit Court of Appeals, in cases such as the instant one, are not courts of original jurisdiction but are simply Appellate

Courts and, therefore the Circuit Court erred in receiving in evidence the foregoing exhibits over the objection of petitioner with no opportunity on his part of testing the accuracy of the same and with no opportunity on his part of being heard before the Appellate Court on the merits of his plea in bar.

We respectfully submit, furthermore, that the holding of the Circuit Court of Appeals herein with reference to the foregoing was and is in conflict with the decisions of the Circuit Court of Appeals of other Circuits concerning the same matter; that the same involves an important question of a Federal law and is an erroneous decision on an important question of general law in conflict with the weight of authority and the applicable decisions of this Court and that, as such, a Writ of Certiorari should be granted herein.

## CONCLUSION

It is, therefore, respectfully submitted that for the reasons hereinbefore stated, this cause is one calling for the exercise by this Court of its supervisory powers, by granting a Writ of Certiorari and thereafter reviewing and reversing the decision and judgment of the Circuit Court of Appeals for the Tenth Circuit herein.

J. Forrest McCutcheon,
801 Perrine Building,
Oklahoma City, Oklahoma,
*Attorney for Petitioner.*

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# BRIEF OF APPELLANT

## Supreme Court of the United States

**OCTOBER TERM, 1940**

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**No. 377**

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HIRAM R. EDWARDS,
*Appellant,*

vs.

THE UNITED STATES OF AMERICA,
*Appellee.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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# BRIEF OF APPELLANT

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## STATEMENT OF THE CASE

*For the sake of brevity, Hiram R. Edwards is herein referred to as Appellant and the United States of America as Appellee.*

This is an appeal from the judgment of the Circuit Court of Appeals for the Tenth Circuit and the judgment and sentence of the United States District Court for the Western District of Oklahoma, wherein appellant herein, Hiram R. Edwards, was found guilty, after plea of *nolo contendere*, for violation of Sec. 77, e and q, Title 15, U.S.

C.A.; Sec. 338, Title 18, U.S.C.A.; and Sec. 88, Title 18, U.S.C.A.; and on the 29th day of January, 1940, was sentenced by the trial court to serve three years on each count of the indictment, the sentences of confinement to run concurrently, in a penitentiary to be designated by the Attorney General. (R. 49).

The indictment was filed in court on the 15th day of November, 1938, and was signed by John Brett, Assistant United States Attorney. The indictment was not signed by the foreman of the Grand Jury, but was endorsed by one Ernest W. Clarke, "Foreman." (R. 39).

The indictment contains eleven counts, the first and second counts charging the sale of securities in various Oklahoma trusts by use of the United States mails and in connection therewith in employing a device, scheme and artifice to defraud in violation of Sec. 17 (a) (1) of the Securities Act of 1933, as amended, (Sec. 77q, Title 15, U. S. C.A.); the third count charging a violation of Sec. 17 (a) (2) of the Securities Act of 1933, as amended, (Sec. 77q, (a) (2), Title 15, U.S.C.A.); the fourth count charging a violaton of Sec. 5 (a) (1), of the Securities Act of 1933, as amended, (Sec. 77c, (a) (1), Title 15, U.S.C.A.); the fifth count charging a violation of Sec. 5 (a) (2) of the Securities Act of 1933, as amended, (Sec. 77e (a) (2), Title 15, U.S. C.A.); the sixth, seventh, eighth, ninth and tenth counts charging a violation of Sec. 338, Title 18, U.S.C.A.; and the eleventh count charging a violation of Sec. 88, Title 18, U.S.C.A., i. e., a conspiracy with one R. B. Binger to violate the Securities Act of 1933 and the mail fraud statute. (R. 4-39).

On December 16, 1938, appellant filed his demurrer to the indictment. (R. 39-41).

On December 16, 1938, appellant filed his plea in bar to the prosecution, setting forth in substance that he had been compelled to testify against himself under subpoena after having claimed his immunity against self-incrimination at a hearing before the Securities and Exchange Commission, in connection with the same matters and things which are the basis of the indictment herein and the connection of appellant therewith, and that by virtue thereof, in accordance with the Constitution of the United States and Section 22 (c) of the Securities Act of 1933, as amended, (Sec. 77 v (c) Title 15, U.S.C.A.), appellant was immune from prosecution and the government barred therefrom. Said plea in bar was duly verified and had attached thereto a letter from the General Counsel of the Securities and Exchange Commissior dated December 8, 1938 refusing the application of appellant for a copy of the transcript of the testimony of appellant in said hearings. (R. 41-45).

On February 28, 1939, appellee filed its motion to strike said plea in bar with objection to the production of said transcript, the same having attached thereto an affidavit of an attorney of the Securities and Exchange Commission. (R. 45-47).

On March 1, 1939, appellant filed his motion to strike said affidavit opposing said plea in bar. (R. 48).

On March 1, 1939, said demurrer and said plea in bar were presented to the trial court, overruled by the court, and exception taken and allowed. *The motion of appellee*

*to strike the plea in bar was overruled* and exception allowed. (R. 48).

Thereafter, on the 17th day of December, 1938, appellant entered a plea of not guilty (R. 49), but on October 25, 1939 he changed his plea of not guilty to a plea of *nolo contendere* (R. 49), and on January 29, 1940 was found guilty by the court and sentenced as above set forth. (R. 49-50).

The plea in bar of appellant was verified by oath and in substance alleged that on or about the 14th day of April, 1938, and on two later times, pursuant to subpoenas *duces tecum*, he appeared and testified before an officer of the Securities and Exchange Commission and after having claimed his immunity against self incrimination, as provided by Section 22 (c) of the Securities Act of 1933, as amended, and the Constitution of the United States, he was immune from prosecution and that by virtue of the foregoing the same should be barred. The plea refers to the proceedings as *hearings* (R. 41-45).

Appellant, in said plea in bar prayed the court to require the Securities and Exchange Commission to produce a transcript of his said testimony before said Commission and *that he be heard on the merits of his plea in bar* (R. 44). The Securities and Exchange Commission, by and through its General Counsel, under date of December 8, 1939, advised Counsel for appellant that the evidence adduced by the Commission had been transmitted to the Attorney General for criminal prosecution and that an indictment had been returned against appellant and the Commission refused to furnish a transcript of his testimony before such

hearing (R. 44-45). The trial court refused to hear appellant on the merits of the plea in bar, and as hereinbefore stated, the plea in bar was overruled by the trial court, to which appellant excepted (R. 48).

Appellee moved to strike appellant's plea in bar (R. 46-47), *which motion was not granted by the trial court* but was likewise overruled (R. 48).

Notice of Appeal under Rule III was duly given, (R. 50-51), setting forth the grounds of appeal, and thereafter appeal bond was duly filed (R. 51).

At the time of the argument of the cause before the Circuit Court of Appeals, appellee, by and through its United States Attorney for the Western District of Oklahoma, introduced in evidence and filed the same, *de novo*, over the objection of appellant, an affidavit of John Brett, Assistant United States Attorney for the Western District of Oklahoma (R. 52-53), and a purported transcript of matters before the Securities and Exchange Commission, which transcript was not signed by the Court. Reporter, nor was there any proof of the correctness of same (R. 53-69). This purported transcript was likewise introduced before the Appellate Court, *de novo*, without the right of cross-examination on the part of appellant and without any proof whatsoever of the correctness or authenticity of the exhibit introduced. *Neither were contained in the record from the trial court.*

Attention is directed to the affidavit introduced in evidence *de novo* before the Appellate Court, which, as above stated, *was not included in the record, nor introduced in evidence in the trial court*, wherein the affiant stated

that the trial court refused to receive said transcript in evidence and that the trial court stated that he did not care to see the transcript, "that he did not need them to pass upon the plea in bar, and that he was going to overrule the defendant's plea in bar." (R. 52-53). That is, the trial court, *without receiving any evidence whatever, was going to overrule said plea in bar*—and did.

The Appellate Court affirmed the judgment and sentence of the trial court on the 29th day of June, 1940 (R. 69-73), the opinion of the court being reported in 113 Fed. (2d) 286.

The Circuit Court of Appeals based its affirmance of the case substantially on the following grounds: (1) That the request of appellant for the Trial Court to compel appellee to furnish a transcript of the proceedings wherein he alleged that he testified under compulsion before the Securities and Exchange Commission after having claimed his immunity against self incrimination was a matter addressed to the discretion of the court and that the same was not herein abused by the denial of appellant's prayer and that even though Rule IV of the Rules and Regulations of the Commission, promulgated under Section 19 (a) of the Securities Act of 1933, providing that hearings shall be stenographically reported and that copies thereof shall be furnished to the parties at certain fixed prices and that even though there were references in the plea in bar to the proceedings as hearings, since there was no allegation that they were hearings appellant was not entitled to have a transcript of his testimony introduced in evidence; (2) that although appellant filed his plea in bar setting forth that he

had testified under compulsion before the Securities and Exchange Commission, after having claimed his immunity against self incrimination, under the provisions of Sec. 22 (c) of the Act, nevertheless, the record failed to indicate any evidence to sustain such allegations; (3) that the demurrer to the eleventh count of the indictment, i. e., the conspiracy count, which attacked that count on the ground of failure to charge that the securities in question were not of a class exempted under Sec. 3 of the Securities Act, was properly overruled, the Circuit Court holding that such exception need not be negatived in the indictment; (4) that inasmuch as the eleventh count of the indictment, i. e., conspiracy count, was good that it was unnecessary to explore the questions presented in the other counts inasmuch as where the sentences run concurrently and do not exceed that which was properly imposed upon the good count the judgment will stand (the Circuit Court of Appeals wholly failed to take into consideration that the maximum confinement that might be imposed on said "good count," i. e., conspiracy (Sec. 88, Tit. 18, U.S.C.A.), is two years instead of three years, on which appellant was sentenced to *three years* imprisonment); (5) that while it would have been better practice for the word "Foreman" in the endorsement on the indictment to be followed by the words "of the Grand Jury," the same was not essential to the validity of the indictment, no Federal Statute having been called to the Court's attention providing that the Foreman shall sign the indictment at the bottom thereof instead of endorsing the same on the back thereof simply with the word "Foreman" instead of "Foreman of the Grand Jury."

Petition for rehearing was filed on the 22nd day of July, 1940 (R. 75-78), and denied by the Circuit Court of Appeals on the same date. (R. 78).

Petition for writ of certiorari was filed in this Court on the 26th day of August, 1940 (R. 79), and the same granted on the 14th day of October, 1940 (R. 78).

## SPECIFICATION OF ERRORS AND POINTS INVOLVED

(1) The Circuit Court of Appeals erred in holding that appellant was not entitled to have produced in evidence the transcript of his testimony before the Securities and Exchange Commission, or to be heard on the merits of his plea in bar.

(2) The Circuit Court of Appeals erred in affirming the judgment of the trial court and approving the action of the trial court in overruling appellant's plea in bar.

(3) The Circuit Court of Appeals erred in affirming the judgment of the trial court and approving the action of the trial court in overruling appellant's demurrer to the indictment.

(4) The Circuit Court of Appeals erred in affirming the judgment of the trial court as to the sentence of appellant to imprisonment of *three* years on the eleventh count of the indictment, i. e., *conspiracy,* (violation of Sec. 88, Title 18, U.S.C.A.), and the judgment is contrary to law as to the entire indictment.

(5) The Circuit Court of Appeals erred in receiving in evidence, *de novo,* over the objection of appellant, certain exhibits and evidence not included in the record on appeal.

## ARGUMENT

### PROPOSITION NO. 1

*(Specification of Errors Nos. 1 and 2)*

**The Circuit Court of Appeals erred in affirming the judgment of the trial court wherein appellant's plea in bar and application to be heard on the merits thereof and to have produced in evidence thereof the transcript of his testimony before the Securities and Exchange Commission was overruled.**

### STATEMENT

As stated above, prior to the plea of appellant to the Indictment, he filed a plea in bar thereto and to the prosecution thereunder, setting forth that prior to the date of the Indictment, he appeared before the Securities and Exchange Commission at Fort Worth, Texas, and Oklahoma City, Oklahoma, pursuant to subpoena, and after having claimed his immunity against self-incrimination, testified against himself under oath pursuant to various questions propounded and asked him concerning Appellant's identity and relationship to the matters which were the subject of the prosecution herein. (R. 41-45).

Said plea in bar included an application seeking to compel Appellee to produce a transcript of Appellant's testimony against himself under such subpoena and compulsion before the said Securities and Exchange Commission.

There is attached to said plea in bar a letter from the General Counsel of the Securities and Exchange Commission refusing to provide Appellant with said transcript and also stating *that the evidence adduced by the Commission was transmitted to the Attorney General for criminal prosecution* and that an Indictment against Appellant concerning said matters had been returned. (R. 45).

As above stated, this plea in bar was overruled by the court and exception allowed by the court and the court refused to hear Appellant upon the merits of his plea in bar or to require Appellee to produce said transcript of the hearing before the Commission.

## ARGUMENT

The Fifth Amendment to the Constitution of the United States, among other things, provides that "no person * * * shall be compelled in any criminal case to be a witness against himself."

We feel that it is practically unnecessary to present any lengthened argument pertaining to this portion of the Constitution, as the broad principle therein set forth has been so well passed upon by all of the courts. That principle has always been jealously protected and safeguarded. however, in passing, we respectfully call attention to the language of the Supreme Court in *Counselman* v. *Hitchcock*, 142 U. S. 562, 35 L. ed. 1110, wherein the Court stated:

> "Its (the Constitution) provision is that no person shall be compelled in *any* criminal case to be a witness against himself. This provision must have a broad construction in favor of the right which it was intended to secure. The matter under investigation by the grand jury in this case was a criminal matter, to inquire whether there had been a criminal violation of the Interstate Commerce Act. If Counselman had been guilty of the matters inquired of in the questions which he refused to answer, he himself was liable to criminal prosecution under the Act. The case before the grand jury was, therefore, a criminal case. The reason given by Counselman for his refusal to answer the questions was that his answers might tend to criminate him, and showed that his apprehension was that, if he answered

the questions truly and fully (as he was bound to do if he should answer them at all), the answers might show that he had committed a crime against the Interstate Commerce Act, for which he might be prosecuted. His answers, therefore, would be testimony against himself, and he would be compelled to give them in a criminal case.

"It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which if seeks to guard." (Italics that of the Court.)

In *Gould* v. *U. S.*, 255 U. S. 296, 65 Law Ed. 648, the Supreme Court of the United States, through Mr. Justice Clarke, stated as follows:

"The part of the 5th Amendment here involved reads:

" 'No person * * * shall be compelled in any criminal case to be a witness against himself.'

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, in *Weeks* v. *United States*, 232 U. S. 383, 58 L. ed. 652, L.R.A. 1915B, 834, 34 Sup. Ct. Rep; 341, Ann. Cas. 1915C, 1177, and in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 64 L. ed. 319, 40 Sup. Ct. Rep. 182) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed

under the Constitution by these two Amendments. The effect of the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizens,—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly overzealous executive officers.

* * * * * * * * * * * *

"The Second question reads:

"'Is the admission of such paper in evidence against the same person, when indicted for crime, a violation of the 5th Amendment?'

"Upon authority of the Boyd Case, supra, this second question must also be answered in the affirmative. In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself, or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the 5th Amendment forbids that he shall be compelled to be a witness against himself in a criminal case."

See also *Sullivan* v. *United States,* 15 F. (2d) 809; and *United States* v. *Bell,* 81 Fed. 830.

The Securities Act of 1933, as amended, and particularly Section 22 (c) thereof, Section 77 v (c) Title 15 U.S.C.A.) provides as follows:

"No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; *but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise,* except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying." (Italics supplied.)

There can be no question but that the foregoing provision of the Securities Act of 1933, is constitutional and, in fact, there is a long line of authorities holding that under the Fifth Amendment to the Constitution, Congress has the power to grant such immunity and amnesty to persons who appear and testify, under compulsion, in any criminal proceeding.

In the instant case, we have the verified and sworn plea of Appellant to the effect that he was compelled to appear before the Securities and Exchange Commission on three different occasions and that at said hearings he appeared under subpoena and was compelled to testify against himself and at the same time claimed his immunity against self-incrimination. In his plea in bar Appellant set forth that he testified under oath to various questions and mat-

ters concerning his identity and relationship to the matters for which he was indicted and later found guilty by the court, including matters pertaining to his personal entries, books, and records. His plea in bar has attached thereto a letter from the Securities and Exchange Commission stating that said evidence *had been transmitted to the Attorney General for criminal prosecution and that an Indictment had been returned.*

In the plea in bar Appellant requested that Appellee produce a transcript of Appellant's said testimony which the Government, for some unanswerable reason, objected to producing and feebly attached to their objection an affidavit of one of the attorneys of the Commission—*one of their own attorneys.*

The plea in bar of Appellant, duly verified, states that Appellant appeared before three *hearings* of the Commission and Appellee, in its motion to strike the plea in bar, in paragraph IV thereof, refers to the proceedings as "hearings." (R 43). Nowhere does Appellee allege or set forth that said proceedings were private investigations but, on the contrary, admits, in substance, that the proceedings were *hearings.*

The Securities Act of 1933 gives the Securities and Exchange Commission the power to make rules and regulations to carry out the provisions of the Act, (Section 77 s (a), Title 15, U.S.C.A.), and pursuant thereto the Commission promulgated the following rule which was in effect at the time of the testimony of Appellant before the Commission:

"Rule IV. Hearings; Evidence. * * *

"(c) Hearings shall be stenographically reported and a transcript thereof shall be made which shall be a part of the record of the proceeding. Transcripts will be supplied to the parties by the official reporter at such rates as may be fixed by contract between the Commission and the reporter."

The question was passed on by the District Court of the Southern District of New York in 1936, in the case of *Securities and Exchange Commission* v. *Torr et al.*, 15 Fed. Supp. 144, and in the case of *In re Securities and Exchange Commission,* (C.C.A. 2d) 1936, 84 Fed. (2d) 316, and in those cases it was held that in a private investigation the party appearing before the Commission was not entitled to a copy of the transcript. Those were cases of private and secret investigations and not of a public hearing and the reason for refusing a copy of the private and confidential papers of the Government in such instances is readily obvious.

In the instant case, the only transcript requested was the record of the testimony of the Appellant *himself* which could not be secret insofar as Appellant was concerned and as the record shows by the affidavit of the attorney for the Securities and Exchange Commission Appellant's attorney, J. Forrest McCutcheon, was present at the various hearings (R. 47). *Such a proceeding is entirely different from a private and secret investigation.*

Irrespective of whether Appellant was entitled to have produced a copy of said transcript, we respectfully submit that the only desire of the Appellant in having the same before the court was for the *truth* to be known and that the

Government be not permitted to take an accused before one of its Commissions and in violation of his constitutional and legal rights, compel him to testify against himself under oath, pursuant to subpoena, and then when the accused comes into court and files his plea in bar to protect himself as he is legally entitled to do, engage itself in practices that if committed by an individual would almost be called chicanery by refusing to produce before the court documentary evidence of a court reporter to show the *truth* as to what actually happened.

Does this Court think for one moment that had not the allegations and averments of Appellant in his plea in bar been absolutely true, that he would have asked the court to produce the court reporter's record showing what actually happened in those three hearings? By the same token, if Appellee did not have something to hide, why didn't it come into court in response to Appellant's application and say: "Here is a *true and correct* copy of the Court Reporter's record, *duly certified,* which shows that you did not testify and incriminate yourself under oath as you swear that you did!"

*There was nothing secret about these hearings. Appellant and his counsel were both present.* We simply wanted the trial court to have the benefit of the exact testimony of Appellant against himself. On the contrary, apparently Appellee didn't want the court to know just what transpired in these hearings.

Appellee knew when this affidavit was attached to its motion to strike, that Appellant would not have the right of cross-examination. *The court refused to hear evidence*

*in support of Appellant's plea in bar.* The affidavit was not admissible in evidence.

In *Holt* v. *United States,* 94 Fed. (2d) 90, the same Appellate Court, in reversing the judgment and sentence of the same trial court herein, held that an *ex parte* statement and affidavit introduced in evidence was inadmissible and that the action of the court in permitting the same was reversible error.

Again, we say, that as a proposition of law, in addition of interest in the question of the *right* of Appellant to have had the transcript of the record above referred to, presented, we still wonder *why* Appellee did not want the court to see the record.

We are sensible of the needs of justice for the apprehension and prosecution of those who violate the law, but we are also sensible of the obligation of the Government to deal fairly with its citizens and not engage itself in double dealing.

Paraphrasing a part of the opinion of Mr. Justice Hutcheson in the case of *United States* v. *Pardue,* 294 Fed. 543, we respectfully say to the Court that the Draconian principle of writing the law in characters so fine that no one can read it and thereby placing the Government in a position to take the unwary ones into its net magnifies the fault of the accused while it minimizes the bad faith of the Government. As Mr. Justice Hutcheson so ably said: "It puts the seal of condemnation upon the offense against the general laws of which the defendant is charged, but it approves double dealing and evasion on the part of the Government in the matter of a man's constitutional protection, which

right reason and sound discrimination cannot, in my opinion, sustain."

*This Government, as a free democracy, guided by an inspired and beloved Constitution, particularly in this day of stress, must not assume the role of Dr. Jekyll and Mr. Hyde.*

*The wisdom of the courts will not be misled.*

The Government cannot ensnare an unsuspecting victim into its net and then, after he has testified against himself, under compulsion, attempt to prosecute him. This case was decided by Judge Hutcheson when on the District Court for the Southern District of Texas, now Justice of the Circuit Court of Appeals of the Fifth Circuit. In the Pardue Case, *supra*, Judge Hutcheson said:

> "This court is entirely sensible of the necessity for apprehending criminals, of the advantage of having criminals suffer for their offenses; but it is equally sensible that there is a higher obligation on government than that of catching one more or less offending criminal—*the obligation of keeping faith with the individual. Whenever the time comes when the courts, in their eagerness to apprehend criminals, deny to the accused that which the laws and the Constitution give him; when men are convicted of offenses against their government, and in the process of that conviction every right which the genius of their country gives them is extended—they can but submit. When, however, they are convicted through a denial of a substantial right extended to them by their government, they can but despair; and when courts permit a construction of the law which makes the government break faith with individuals, whether offenders or not, then the reason for courts has ceased, and justice is no more.* (Italics ours.)

"In what has been said it is not meant to hold that the mere fact of a subpoena confers an exemption. The controlling question is: Did he testify voluntarily, or upon compulsion; and it is in my opinion immaterial in law whether the witness testified under a subpoena or was called without a subpoena and put upon the stand upon compulsion by the government. *Upon the controlling issue of fact in cases of this kind, however, whether a witness testified voluntarily or upon compulsion,* if a witness appears under a subpoena and is placed upon the stand by the government, *the fact of compulsion is prima facie established,* and the *burden shifts to the government to show that, notwithstanding all of the indicia of compulsory testimony, the witness in fact waived his privilege, and testified voluntarily.*" (Italics that of the court.)

The fact that Appellant entered a plea of *nolo contendere* and none of the testimony which he had given against himself, under compulsion before the Commission, was actually introduced in evidence in a trial against him, cannot excuse Appellee or avail it of the position that he has not, therefore, been harmed.

The Securities Act, Section 22 (c), quoted *supra*, does not say that the evidence must actually be used in a trial against the accused, nor that he is required to await its possible use or offer in evidence, and then object to protect himself, but, on the contrary, the Securities Act provides that when he appears under compulsion and claims his immunity against self-incrimination and is compelled to testify, as here, that he *shall not be prosecuted* for or on account of any transaction, matter or thing concerning which he was compelled to testify about. (Section 77v (c), Title 15, U.S.C.A.). There is, therefore, no question but that

when Appellant testified before the Commission and claimed his immunity against self-incrimination as set forth in his verified plea in bar, the protection afforded him by the Constitution and Section 22 (c) of the Securities Act, attached then and there without further objection or act on his part.

Anticipating that Appellee might urge that Appellant did not prove or establish his allegations in his plea in bar, we say that the plea of Appellant was duly verified and that the responsive pleadings of Appellee were *overruled* by the court and that the court *did not sustain* Appellee's response to Appellant's plea in bar. Appellant asked the court to be heard on the merits of his plea in bar to require Appellee to produce the transcript of his testimony before the Commission. Assuming that the court did not err in compelling Appellee to produce said transcript, there is no question but that the Court erred in refusing to hear testimony and evidence from Appellant and his witnesses to establish the allegations in his plea in bar.

The motion of Appellee to strike the plea in bar is not based on a question of law; it is founded on a question of fact, and which motion to strike of Appellee the court did not sustain.

The law is for the purpose of guarding against injustice to the people. Law was not made for logicians or magicians. Law and justice should be interpreted and measured by the courts in the same manner that those interpreting the same would consider in the ordinary and weighty problems of their daily life, without technicalities, folderols or quibbles. In other words, when Appellant

filed his plea in bar and requested a transcript of his testimony before the Commission and when Appellee objected to the production of the transcript, we have, in effect, the following situation: Appellant said, "I want the record because I am right—if I were wrong, I wouldn't demand the record." Appellee said—"We don't want you to have the record because we know we are wrong and you are right——If you were wrong and we were right, we would gladly produce the record."

*Appellant demanded the record—Appellee refused it.*

We submit that it cannot be urged seriously by Appellee that since Appellant entered a plea of *nolo contendere* he waived his constitutional and legal rights of immunity. A constitutional right of an accused cannot be waived except expressly and which, of course, is not the case here. Appellant retained and still retains his constitutional rights and, as a matter of fact, under his plea of *nolo contendere* could have been found not guilty by the court, or the case dismissed. A plea of *nolo contendere* is, in fact, no plea whatsoever, except that it is commonly understood to be "I do not contend," entered with leave of the court. (*United States* v. *Tucker*, 196 Fed. 260), and, in fact, in this case, Appellant's co-defendant, R. B. Binger, entered a plea of *nolo contendere* along with Appellant and the charges against him were *dismissed* by the court. (R. 50).

The verified plea in bar of Appellant presents the situation of his having testified against himself at a hearing before the Securities and Exchange Commission, under compulsion, and, after having claimed his immunity against self-incrimination, the testimony being in connection with

and relating to the matters and things for which he was indicted and convicted. The record further shows that the reply of Appellee to said plea in bar was *overruled by the court and in no wise sustained.* We say, therefore, that the plea in bar should have been granted and that the court's action in *not hearing testimony in support thereof* and in overruling said verified plea in bar when it had overruled the objection of Appellee was error and that the judgment and sentence of the court herein should be reversed.

The Circuit Court of Appeals took the viewpoint that Rule IV, *supra,* had no application to testimony taken in the course of investigations as distinguished from *hearings* and cites as authority therefor the cases: *In re Securities and Exchange Commission,* 84 F. (2d) 316, and *Securities and Exchange Commission* v. *Torr,* 15 Fed. Supp. 144, referred to *supra.* These were cases wherein the proceedings before the Commission were in fact *investigations* whereas in the instant case the proceedings were referred to as *hearings* and the reference to the proceedings as such was not disputed by Appellant.

It is readily to be seen why a transcript of the proceedings in a *secret investigation* would be withheld, but where the proceeding was one wherein appellant's counsel was present, as in the instant case then we have an entirely different situation and we respectfully submit that such proceeding is a *hearing* within the meaning of the law and the rules and regulations of the Commission and that, as such, appellant was entitled to have produced in evidence a copy of the transcript of his testimony at such hearing as pro-

vided for by Rule IV of the rules and regulations of the Commission, and that it was error for the trial court to refuse appellant's request therefor, in order to give him an opportunity to test the correctness of the purported transcript that might be presented under the proper rules of evidence governing introduction of such documents and instruments, instead of appellant being at the mercy of the Circuit Court of Appeals in receiving in evidence, *de novo*, a purported copy of the same, *uncertified* to by the Court Reporter, and with no showing whatsoever that the same was a true and correct copy of what it purported to be as was done here.

We respectfully submit, therefore, that the Circuit Court of Appeals erred in affirming the judgment and sentence of the trial court and in approving the action of the trial court in overruling appellant's plea in bar and *his application to be heard on the merits thereof* and to have produced in evidence the transcript of his testimony before the Securities and Exchange Commission in order that his counsel might have the right of cross-examination concerning the same and the right of testing its correctness and authenticity and we respectfully say that the opinion, and the judgment of the Circuit Court of Appeals herein in connection with the foregoing was and is contrary to the law and violative of the Constitutional rights of appellant and that the judgment of the Circuit Court of Appeals herein should be reversed.

## PROPOSITION NO. 2

*(Specification of Error No. 3)*

**The Indictment was invalid and the demurrer of appellant thereto should have been sustained by the trial court.**

### STATEMENT

An abstract of the charges contained in the Indictment is set forth in the Statement of the Case, *supra,* and therefore it is not deemed necessary to repeat the same. However, we briefly refer to the alleged schemes and ventures charged in the Indictment.

The first count charges that Appellant, with his co-defendant, R. B. Binger, in carrying on the alleged device scheme and artifice to defraud and the use of the mails to effectuate the same, organized several business trusts under the laws of the State of Oklahoma, *viz.,* the H. R. Edwards Comanche County, Oklahoma, Trust, the Edwards Indian Chief Trust, the Indian Chief Additional Development Trust, the Indian Chief Protection Lease Trust, and the Edwards Combined Trust, all holding divers and sundry interests in oil and gas mining properties and drilling wells thereon in Oklahoma and Texas.

The demurrer to the Indictment was duly presented to the court before plea to the Indictment, and was overruled by the court, and exception taken and allowed (R. 48).

### ARGUMENT

**(a) The Indictment was not signed by the Foreman of the Grand Jury.**

As stated, *supra,* in the Statement of the Case, the Indictment appears to have been signed by John Brett, Assistant United States Attorney and endorsed by Ernest W.

Clarke "foreman," but not by the *foreman of the Grand Jury.* (R. 39.)

We do not know whether Ernest W. Clarke was foreman of the Grand Jury, foreman of the Federal Building, foreman of some W. P. A. project, or what. There is nothing whatsoever to indicate that he was the duly selected and acting foreman of the regularly qualified and empaneled Grand Jury that presented the purported Indictment.

In *United States* v. *Levally,* 36 Fed. 687 (D.C. W.D. Pa.), the court, in passing upon the sufficiency of an Indictment where the foreman of the Grand Jury simply wrote his name across the back of the Bill of Indictment, held the same insufficient and in connection therewith stated:

> "This case differs essentially from *State* v. *Freeman,* 13 N. H. 488; *Com.* v. *Smyth,* 11 Cush. 473; *Price's Case,* 21 Grat. 846, and other cases cited and relied on by the district attorney. In this court the practice is, and always has been, for the district attorney to prepare in advance the bills of indictment, and submit the same, with the evidence to support them, to the grand jury, whose action in each case, finding or ignoring the bill, is indorsed thereon, such indorsement being attested by the signature of the foreman thereunder. The foreman never signs his name at the foot of the bill, and the only written evidence of the action of the grand jury is the indorsement. The grand jury having brought the bill into court, in answer to the usual question hand the indictment to the clerk. The finding is not publicly announced, ther by the grand jury or the clerk, nor is any re ord thereof then made; but subsequently the clerk m kes the proper entry on the minute-book and docket from the indorsement on the bill. In the present case the foreman of the grand jury merely wrote his name in blank across the back of the

bill, under the date, 'Oct. 16, 1888.' It is quite impossible, then, to determine from anything that appears what the action of the grand jury really was. From this incomplete and insensible indorsement it cannot be assumed that the intention was to find the bill to be true. Nor are we at liberty, as suggested, to carry down the word 'indictment,' printed on the back of the bill, and treat it as part of the finding of the grand jury, even conceding (which we are by no means prepared to do) that the use of that word alone, under the ruling in *Sparks* v. *Com.*, 9 Pa. St. 354, would suffice. Nowhere upon the record is there any entry importing the finding of the bill as true. The words 'indictment filed' have no such significance, and the entry, 'a true bill,' upon the calendar or trial-list, prepared for the use of the judge, is a matter of no moment. Indeed, the clerk could not properly make any record of the finding of the bill as true, for no such finding was reduced to writing by the grand jury, or publicly announced by them in court. The sum of the matter, then, is that by an oversight the trial here erroneously proceeded, without it appearing in anywise that the bill of indictment had been found by the grand jury. Therefore the motion in arrest of judgment must prevail."

In *Frisbie* v. *United States*, 157 U. S. 160, 39 L. ed. 657, a similar question was presented to the court, however, in that case the court held that the objection, (cured here by demurrer) came too late to be raised in the Supreme Court. Attention is directed, however, to the following language of the court:

"There is in the Federal Statutes no mandatory provision requiring such indorsement or authentication, and the matter must, therefore, be determined on general principles. It may be conceded that in the mother country, formerly at least, such indorsement

and authentication were essential. 'The indorsement is parcel of the Indictment and the perfection of it.' *King* v. *Ford,* Yelv. 99."

It does not appear that the Foreman of the *Grand Jury* signed the Indictment herein, but, assuming him to have been the duly qualified foreman, he merely endorsed his name on the back of the Bill. There is nothing in the record to indicate what official capacity, if any, was held by the said Ernest W. Clarke in connection with the purported Indictment. It has been held that an endorsement on the back of a Bill of Indictment forms no part of the Indictment. See *Lee Choy* v. *United States,* 293 Fed. 582 (U.S. C.C. Hawaii); and *Wechsler* v. *United States,* 158 Fed. 579 (U.S. C.C. N.Y.).

We respectfully submit, therefore, that since the endorsement on the back of a Bill of Indictment forms no part of the Indictment itself, and that in the absence of the signature of the Foreman of the Grand Jury on the Indictment and in the absence of a showing that the said Ernest W. Clarke was actually Foreman of the Grand Jury, the demurrer to the Indictment should have been sustained on this point alone.

Counts 1 and 2 of the indictment were and are fatally defective in that the same wholly fail to negative the allegations therein contained and consist principally of conclusions and negative pregnants.

**(b) Count three of the Indictment is defective for the reason that the same fails to charge wherein the omissions complained of were material and what the circumstances were under which the same were made.**

Count three of the Indictment attempts to charge a violation of Section 17 (a) (2) of the Securities Act of 1933, as amended, (Section 77 q (a) (2), Title 15 U.S.C.A.) in that Appellant, in the sale of securities in the Edwards Indian Chief Trust, by use of the United States Mails, omitted to state material facts necessary to be stated to make the statements made, in the light of the circumstances under which they were made, not misleading. (R. 13-25).

The allegations in support thereof, in substance, are that Appellant, in the use of the United States Mails, referred to certain producing oil and gas fields around his properties, but that he failed to state that there were dry holes, or non-producing wells between his lease and said producing fields, but nowhere in the Indictment is it alleged *wherein* the failure to make reference to said non-productive wells was an omission of a material fact.

We respectfully submit that the omission to refer to non-productive wells between an anticipated field and other producing oil fields surrounding the anticipated field, has no bearing whatsoever on the question of whether oil will be produced in the anticipated field. This is a well known fact in the petroleum industry. In fact, the presence of dry holes in a general area, with the knowledge of the various strata passed through, is not only indicative of a producing oil structure, but, in most cases, is the *indicia* of production.

It is a well accepted principle in the petroleum industry that new oil fields are located and found by virtue of

the sub-surface data obtained from dry holes drilled around the new structure. There is no representation that the well being drilled by Appellant, referred to in the third count of the Indictment, was a part of any of the other producing fields, nor was there any representation that all of the pools together was just one oil field. There could be, therefore, no fraud in omitting to make reference to dry holes which were off-structure as it is well established in the Mid-Continent area that said dry holes are helpful in determining whether the location of a new well, such as Appellant was drilling, was on structure or not.

We respectfully submit, therefore, that the allegations of omission contained in the third count of the Indictment are simply the conclusions of the pleader and that the same state no fact or facts showing that the same were misleading, or that further disclosures should have been made by Appellant in the sale of the said securities. Consequently the demurrer to the third count of the Indictment should have been sustained. The defects of Counts 1 and 2 are obvious.

**(c) Counts 4 and 5 of the Indictment are defective in that the same charge no violation of the law.**

Count four of the Indictment charges Appellant with a violation of Section 5 (a) (1) of the Securities Act of 1933, as amended, (Section 77 e (a) (1) Title 15 U.S.C.A.) and count 5 of the Indictment charges a violation of Section 5 (a) of the Securities Act of 1933, as amended, (Section 77 e (a) (2), Title 15 U.S.C.A.) in the sale of securities in the Indian Chief Protection Lease Trust, the said counts alleging that said securities were sold and offered for sale

"there not then being in effect a registration statement filed with the Securities and Exchange Commission." (R. 25-27).

Section 5 (a) of the Securities Act of 1933, as amended, (Sections 77 e and 77 e, Title 15 U.S.C.A.) prohibits the use of the United States Mail or the use of Interstate Commerce to sell or offer for sale securities unless a registration statement is in effect, however, Section 3 (b), (Section 77 c (b) Title 15 U.S.C.A.) provides as follows:

> "The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this subchapter with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $100,000."

Pursuant to the foregoing provision of the law, the Securities and Exchange Commission duly promulgated and made effective, as a part of its general rules and regulations, Rule 200, which provided:

> "Subject to the conditions stated in this rule, the following securities are added, pursuant to section 3 (b) of the Act, to the classes of securities exempted as provided in section 3 (a) of the Act:
>
> "Any securities (other than those specified below) upon the condition that the aggregate offering price to the public shall not exceed the sum of $30,000: *Provided, however,* that the amount of the offering shall be reduced by the amount of any other offerings

(whether public or private), within one year prior to the offering herein exempted, of securities of the same issuer, or of any person controlling, controlled by, or under common control with such issuer, unless, or except to the extent that, such offerings have been withdrawn or have comprised securities (a) such as are described in section 3 (a) (3) of the Act or (b) issued in connection with the liquidation or the purchase or pledge of the assets of any national banking association and to which the provisions of title I of the Act do not apply by reason of any of the provisions of subsection (a) of section 3 thereof. The aggregate offering price of securities offered at the market shall be taken as the product of the number of units offered multiplied by the price per unit at which the securities were bona fide sold on the first day of sale. The aggregate offering price of any securities exchanged for bona fide outstanding securities or claims shall be determined as provided in rule 205.

"This rule shall not be applicable to exempt (1) certificates of deposit, except certificates of deposit or receipts issued pursuant to a plan and/or agreement under which such certificates of deposit or receipts are to be exchanged for bonds issued by the Home Owners' Loan Corporation and/or the net cash proceeds thereof: (2) securities exchanged for bona fide outstanding securities or claims; (3) voting trust certificates; or (4) overriding royalty interests, oil and/or gas payments, or fractional undivided interests in oil, gas, or other mineral rights."

This rule was in full force and effect at the time the mails were used by Appellant in said counts 4 and 5 of the Indictment. The provision of the rule, not exempting certificates of interest in trusts, did not become effective until March 1, 1938, by virtue of the adoption of the Commission

of Regulation B-T, which was subsequent to the use of the mails by Appellant.

Even though Section 5 of the Securities Act of 1933, requires the registration of certain securities, nevertheless Section 3 of the Act exempts from registration certain described classes of securities, including those exempted by the Commission under its General Rules and Regulations, where the issue is under the $100,000. Therefore, we respectfully submit that counts 4 and 5 of the Indictment are defective in that there is no allegation that the securities offered by Appellant were not in the class of securities exempted from registration under Section 3 of the Securities Act of 1933, and the Rules and Regulations of the Securities and Exchange Commission exempting various classes of securities as provided for by Section 3 (b) of said Act.

Rule 200 permitted the sale of securities, without registration up to $30,000, and other rules of the Commission permitted the sale of securities, without registration, upon complying with certain requirements up to $100,000. An allegation, therefore, to the effect that the accused sold securities without registration states no cause of action whatsoever. *It is no violation of the law to sell securities without registration.* The Act exempts certain classes of securities without registration and the rules and regulations promulgated under the Act exempts certain securities from registration and it is respectfully submitted that said counts of the Indictment are fatally defective and wholly fail to state a cause of action without alleging that the securities sold or offered for sale were of a class required to be regis-

tered and not exempt under the provisions of the law and the rules and regulations promulgated under said Act.

*It is elementary that securities may be sold and offered for sale without there being in effect a registration statement.*

We submit that the point raised is somewhat like that of the decisions of the courts in passing on the validity of indictments under the Harrison Narcotic Act. An indictment simply charging the possession of narcotics is invalid. There must be a charge that the accused was a person who had not registered and *who was required to register under the law.* In the instant case there is no allegation that the securities sold or offered for sale were of a class requiring registration. Securities coming under Secs. 3 or 4 of the Act do not require registration. *The burden of pleading is as much a duty of the government as the proof.*

In *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 60 L. ed. 1061, the Supreme Court of the United States affirmed the action of the trial court in quashing an Indictment wherein the accused was charged with the possession of narcotics, the Indictment failing to charge that the accused was a person *required to register* under the law.

The trial court in that case (225 Fed. 1003) states as follows:

> "The unlawful act, therefore charged against the defendant, is not the improper or unlawful dispensing of a drug, whether in good or bad faith, but consists in having in the possession and under the control of Martin certain drugs. The indictment, therefore, cannot be sustained, unless the having in the possession and under the control of Martin of certain drugs is an unlawful thing and a violation of the act of Congress.

"In reading the eighth section in connection with the remaining sections of the act of Congress, when it provides that it shall be unlawful for any person not registered under the provisions of this act to have in his possession certain drugs, I think that the word 'person' should be held to refer to the persons with whom the act of Congress is dealing; that is, the persons who are required to register and pay the special tax, in order to import, produce, manufacture, deal in, dispense, sell, or distribute. And there is no allegation in the indictment that Martin had in his possession these drugs for any of these purposes.

"The indictment, therefore, could not be sustained, unless the mere fact of having the drug in his possession is a violation of the law. If so, any person would be presumptively guilty and subject to indictment, and have the burden of proof cast upon him under this section, if he had any small amount of the prescribed drug in his possession, whether legitimate or otherwise."

The Supreme Court of the United States, through Mr. Justice Holmes, in the case, stated:

"Approaching the issue from this point of view we conclude that 'any person not registered' in Sec. 8 cannot be taken to mean any person in the United States, but must be taken to refer to the class with which the statute undertakes to deal,—*the persons who are required to register by Sec. 1.* It is true that the exemption of possession of drugs prescribed in good faith by a physician is a powerful argument, taken by itself, for a broader meaning. But every question of construction is unique, and an argument in another. This exemption stands alongside of one that saves employees of registered persons, as do Secs. 1 and 4, and nurses under the supervision of a physician, etc., as does Sec. 4, and is so far vague that it may have had in mind

other persons carrying out a doctor's orders rather than the patients. The general purpose seems to be to apply to possession exemptions similar to those applied to registration. Even if for a moment the scope and intent of the act were lost sight of, the proviso is not enough to overcome the dominant considerations that prevail in our mind."

See also *United States* v. *Wilson*, 225 Fed. 82; *United States* v. *Carney*, 228 Fed. 163; *Swartz* v. *United States*, 280 Fed. 115; and *Ex parte McGonigal*, 2 Fed. (2d) 784.

**(d) Counts 6 to 10, inclusive, fail to charge Appellant with violation of any valid subsisting law of the United States, in that Section 338, Title 18, U.S.C.A., insofar as the same applies to the instant case, was repealed by the Securities Act of 1933 as amended.**

Counts 6 to 10, inclusive, of the Indictment charge Appellant with a violation of Section 338, Title 18, U.S.C.A., i. e., with having devised a scheme and artifice to defraud and with the use of the United States mails to effectuate the same (R. 28-35).

The pertinent language in the mail fraud Statute, is as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises * * * shall, for the purpose of effecting such scheme or artifice, or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement * * * in any post office * * * to be sent or delivered by the post office establishment of the United States * * * shall be fined" etc.

The Securities Act of 1933, and particularly Section 17 thereof (Section 77 q, Title 15 U.S.C.A.) provides as follows to-wit:

> "(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> "(1) to employ any device, scheme, or artifice to defraud, or
>
> "(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.
>
> "(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.
>
> "(c) The exemptions provided in section 77c shall not apply to the provisions of this section."

The mail fraud statute is the prior statute; the Securities Act is the latter one, and we respectfully submit that

insofar as the same is applicable to the sale or offer of sale of securities through the United States mails in carrying out and employing a fraudulent scheme as that described in the Indictment herein, the provisions of both statutes are substantially the same and that it was the intention of Congress in the amendment to the Securities Act of 1933, insofar as the same applies to the securities in question here, that the Mail Fraud Statute (Section 338, Title 18 U.S.C.A.) was and is repealed.

Attention is directed to the fact that when the Securities Act of 1933 was first enacted, Section 5 (c) thereof provided:

> "The provisions of this Section relating to the use of the mails shall not apply to the sale of any security where the issue of which it is a part is sold only to persons resident within a single state or territory . . . ."

and that this provision was repealed in 1934, giving the Securities Act full control of the use of the mails whether interstate or intrastate, thus reflecting that it was the intention of Congress in that amendment that the Securities Act should repeal and supersede the mail fraud statute insofar as the same is applicable to securities of the type and class involved herein.

We realize that the District Court for the Northern District of Texas, in the case of *United States* v. *Alluan et al.*, 13 Fed. Supp. 289, held that the Securities Act of 1933 did not repeal the mail fraud statute and that the same view was taken by the Circuit Court of Appeals for the Second Circuit in the case of *United States* v. *Rollnick et al.*, 91 Fed. (2d) 911. With the holdings of these two courts, we cannot agree. They may have some persuasive effect on

this Court, but certainly are not binding and we submit that an analysis of the law can only lead to the conclusion that the mail fraud statute was repealed by implication by the enactment of the Securities Act of 1933.

In the Alluan case, the view is taken by the court that under the mail fraud statute the offense could be committed before any securities were sold and that the violation under the Securities Act was not completed until the sale actually took place. The court further held to the view that the punishment under the mail fraud statute was for the fraud itself the violation being complete without a sale, whereas, the punishment for the Securities Act was for the fruit of the fraud, requiring an actual sale. Of course, this view is not the law and is erroneous.

Section 17 of the Securities Act, as above quoted, refers to the employment of a device, scheme or artifice to defraud and the use of the mails or interstate commerce to effectuate the same. Section 5 of the Securities Act refers to the use of the mails in the sale of securities and Section 2 (3) of the Act (Section 77b (3) Title 15, U.S.C.A.) provides that the term "sale" shall include every *attempt* or offer to dispose of any security, that is, any letter, or writing, going through interstate commerce or the United States mails, just the same as in the mail fraud statute. There need be no actual sale to violate the Securities Act.

Where there are two acts of Congress on the same subject and the last embraces the provisions of the first, insofar as the same is applicable to a particular case before the court, the effect of the subsequent act is that of repealing the prior law by implication. See *United States* v. *Tynen*, 78 U. S. 95, 20 L. ed. 153.

We respectfully submit, therefore, that insofar as counts 6 to 10, inclusive, of the Indictment are concerned, the same charge no violation of any valid and subsisting law of the United States and that the demurrer to said counts should have been sustained by the trial court.

**(e) Count 11 of the Indictment failed to state a cause of action against Appellant and should have been dismissed by the court.**

Count 11 of the Indictment charges a violation of Section 88, Title 18 U.S.C.A., i.e., a conspiracy by and between Appellant and one R. B. Binger, to commit violations of the Securities Act of 1933, and of the mail fraud statute (Section 338, Title 18 U.S.C.A.) in the sale of securities in the various trusts named above. (R. 35-39).

There are no allegations in said count of the Indictment to the effect that the securities sold were of a class required to be registered with the Securities and Exchange Commission which, as presented, *supra*, we submit the allegations are too vague and indefinite and do not state a cause of action against Appellant.

It is to be noted that Appellant is charged with conspiracy with R. B. Binger and that on the 29th day of January, 1940, the same day Appellant was found guilty, the charges against the said R. B. Binger were dismissed on motion of Appellee, after he had entered his plea of *nolo contendere* (R. 50).

We submit, therefore, that this count should have been dismissed as to Appellant; that he cannot be convicted for having conspired with himself, and the dismissal, or acquittal of the defendant, Binger, automatically required the

dismissal or acquittal of Appellant. While this could not have been anticipated at the time of the presentation of the demurrer, nevertheless we say that the action of the court in finding Appellant guilty and sentencing him on the conspiracy count, was and is contrary to law and as to said count the judgment of the trial court should be reversed.

## PROPOSITION NO. 3

*(Specification of Error No. 4)*

**The Circuit Court of Appeals erred in affirming the judgment of the trial court in sentencing appellant to three years imprisonment on the eleventh count of the indictment, i. e., conspiracy; and the judgment as to the entire charge is contrary to law.**

Appellant was charged and found guilty of a violation of the eleventh count of the indictment, i. e., conspiracy, and sentenced thereupon to serve three years in a penitentiary to be designated by the Attorney General.

Section 88, Title 18, U.S.C.A., provides that the maximum confinement for violation of this statute is *two years* instead of *three years* as appellant was sentenced.

The Circuit Court of Appeals (R. 72) takes the position, with reference to the eleventh count of the indictment; that since it is a good count, and since appellant's sentence was to run concurrently with other counts in the indictment, that the sentence of three years on the conspiracy count should stand. The opinion of the Circuit Court of Appeals, after holding that the eleventh count of the indictment was good stated that there was no need to explore the questions presented in connection with the other counts. We respectfully submit that the Circuit Court of Appeals erred in affirming the judgment of the trial court wherein appellant

was sentenced to serve three years on each count of the indictment (the same including the eleventh count), the court taking the view that said count was the *good* count of the indictment and the court failing and refusing to explore the questions presented as to the other or *bad* counts of the indictment.

Appellant was charged in the Indictment with various other offenses, as more fully set forth above, than those of which he was found guilty. There is no charge in the Indictment of Appellant's having used the United States mails in the sale of securities *with intention to defraud without having in effect a registration statement* filed with the Securities and Exchange Commission and, therefore, we respectfully submit that the court erred in finding Appellant guilty on any such purported violation or charge.

Counts 4 and 5 of the Indictment charge Appellant with having sold securities through the United States mails without having in effect a registration statement, but there is no charge of fraud in said counts whatsoever.

Clearly, counts 4 and 5 of the Indictment state no cause of action of violation of the law in that said counts merely charge Appellant with the sale of securities without having a registration statement in effect with the Securities and Exchange Commission, *without alleging that said securities were of a class requiring registration,* all as more fully argued and presented *supra*. For the reasons above stated, the demurrer to said counts should have been sustained and the judgment and sentence of the court should be reversed.

The judgment and commitment of the court, with reference to the foregoing, reads as follows:

"The defendant having been convicted on his plea of nolo contendere to the offenses charged in the indictment in the above entitled cause, to-wit: Using United States Mails in sale of certain securities with intent to defraud without having in effect a registration statement, filed with the Securities and Exchange Commission; and Conspiracy in using United States mails in furtherance of scheme to defraud; * * *." (R. 49-50).

*There is no such charge in the indictment, outside of the conspiracy count, on which the judgment and sentence of the trial court,* supra, *was rendered.*

It is, therefore, respectfully submitted that the judgment of the trial court and the affirmance thereof by the Circuit Court of Appeals is contrary to law and that the judgment should be reversed.

## PROPOSITION NO. 4

*(Specification of Error No. 5)*

**The Circuit Court of Appeals erred in receiving in evidence, de novo, over the objection of appellant, certain exhibits and evidence not included in the record on appeal.**

We think the facts with reference to this proposition have been sufficiently stated, *supra,* however, it will be recalled that at the time of the presentation of the argument of counsel herein before the Circuit Court of Appeals, the court received in evidence, over the objection of appellant (R. 52-69), an affidavit of an Assistant United States Attorney and a purported transcript of the testimony of appellant before the Securities and Exchange Commission. These exhibits and this evidence were received by the Circuit Court of Appeals, *de novo,* and neither was included in the record on appeal.

First of all, it is respectfully submitted that an affidavit is not even admissible in the trial court, much less in the Appellate Court, as original evidence. See *Holt* v. *United States*, 94 Fed. (2d) 90, (C.C.A. 10th). Neither was the purported transcript admissible, which was not a part of the record on appeal, there being no test made of its correctness or authenticity and the same wholly failing to show that it was certified to by the Court Reporter.

There was no proof of the authenticity of the purported record—there was no right of cross examination—appellant was not given his constitutional right of being *confronted* with witnesses.

Section 212, Title 28, U.S.C.A. (Sec. 117 of the Judicial Code) provides as follows:

> "There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, which shall be a court of record, *with appellate jurisdiction*, as hereinafter limited and established."

It has been repeatedly held that the Circuit Courts of Appeals have no original jurisdiction and that their jurisdiction is appellate only, except in such cases as may be necessary to carry out such appellate jurisdiction. See *Whitney* v. *Dick*, 202 U. S. 132; *United States* v. *Mayer*, 235 U. S. 55; *Travis County* v. *King Iron Co.*, 174 U. S. 801; *Fowler* v. *Seymour*, 95 Fed. (2d) 627 (C.C.A. 9th 1938); *Millers Mut. Fire Ins. Ass'n* v. *Warroad Potatoes Growers Ass'n*, 94 Fed. (2d) 741 (4th C.C.A.; 1938); *Hill* v. *Douglass*, 78 Fed. (2d) 851 (C.C.A. 9th 1935).

In *Hali* v. *United States*, 78 Fed. (2d) 168 (10th C.C.A. 1935), the same Circuit Court of Appeals, from which a review is sought herein, stated as follows:

> "*The jurisdiction of the Circuit Courts of Appeals is purely appellate, and they have no original jurisdiction* except such as is necessary to aid, protect, or enforce their appellate jurisdiction. *United States* v. *Mayer*, 235 U. S. 55, 65, 35 S. Ct. 16, 59 L. Ed. 129; *Frankel* v. *Woodrough* (C.C.A.) 7 F. (2d) 796, 797; *Whitney* v. *Dick*, 202 U. S. 132, 137, 26 S. Ct. 584, 50 L. Ed. 963. For us to entertain a motion for a new trial filed in the District Court, would be to exercise original, not appellate, jurisdiction.
>
> "The proper procedure is indicated in *Roemer* v. *Simon*, 91 U. S. 149, 150, 23 L. Ed. 267, where the court said: 'It is clear, that, after an appeal in equity to this court, we cannot, upon motion, set aside a decree of the court below, and grant a rehearing. We can only affirm, reverse, or modify the decree appealed from, and that upon the hearing of the cause. *No new evidence can be received here.*'" (Italics supplied).

Attention is also directed to the language of the Court of the Fourth Circuit Court of Appeals in *Stephenson* v. *Equitable Life Assur. Soc.* v. *United States*, 92 Fed. (2d) 406, wherein the court had to say at page 410:

> "As the judge below did not pass upon the merits of the case but dismissed it for lack of jurisdiction, and there is no assignment of error relating to the merits, we cannot pass upon the merits here. In reversing the dismissal on the jurisdictional point there is nothing that we can do but remand the cause for further proceedings. We have been urged to interpret the incontestable clause of the policy; but our powers are solely those of an appellate court, and we can pass on the merits of a cause only by way of review."

See also *Chisholm-Ryder Co., Inc.* v. *Buck*, 65 F. (2d) 735 (C.C.A. 4th 1933).

We respectfully submit, therefore, that the Circuit Court of Appeals erred in receiving and considering in evidence, *de novo*, the foregoing evidence, none of which was included in the record on appeal, and none of which was admissible in the Appellate Court.

The statutes and the authorities are clear that the Circuit Court of Appeals, in cases such as the instant one, are not courts of original jurisdiction but are simply Appellate Courts and therefore the Circuit Court erred in receiving in evidence the foregoing exhibits over the objection of appellant with no opportunity on his part of testing the accuracy of the same, as by law provided, in the trial court.

## CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that the judgment and sentence of the trial court was and is erroneous and that the judgment of the Circuit Court of Appeals for the Tenth Circuit herein affirming said judgment should be in all things reversed and the indictment herein ordered dismissed and appellant discharged.

Respectfully submitted,

J. Forrest McCutcheon,
1005 Texas Bank Building,
Dallas, Texas,
*Attorney for Appellant.*

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FILE COPY



No. 377

# In the Supreme Court of the United States

OCTOBER TERM, 1946.

HIRAM R. EVANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 377

HIRAM R. EDWARDS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 72–76), is reported in 113 F. (2d) 286.

### JURISDICTION

The judgment sought to be reviewed was entered June 29, 1940 (R. 76–77). A petition for rehearing (R. 79–81) was denied July 22, 1940 (R. 82). The petition for writ of certiorari was filed August 26, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

## QUESTIONS PRESENTED

The principal questions presented are:

(1) Whether the trial court erred in overruling petitioner's "plea in bar and application for production of transcript of evidence."

(2) Whether the Circuit Court of Appeals committed reversible error in holding that the conspiracy count supported the three-year sentence imposed upon the petitioner.

## STATUTES INVOLVED

These, as well as the pertinent provisions of the Rules of Practice of the Securities and Exchange Commission, are included in the Appendix (*infra*, pp. 11–14).

## STATEMENT

An indictment in eleven counts was returned against the petitioner and another in the District Court for the Western District of Oklahoma. The first two counts charged violations of Section 17(a)(1) of the Securities Act of 1933; the third a violation of Section 17(a)(2) of the Securities Act; the fourth and fifth, violations of Sections 5(a)(1) and (2), respectively, of the Securities Act; six to ten, violations of the Mail Fraud Statute, and the eleventh a conspiracy to violate the Mail Fraud Statute and the Securities Act (R. 5–

40). The indictment dealt generally with the formation of certain business trusts in Oklahoma for the production of oil and the issuance, sale, and delivery of units or certificates of beneficial interest in such trusts under false and misleading statements.

After the overruling (R. 49–50) of a demurrer (R. 41–42) and a "Plea in Bar and Application for Production of Transcript of Evidence" (R. 43–46), the petitioner withdrew his plea of not guilty, entered a plea of *nolo contendere* to each count of the indictment (R. 50), and was sentenced to three years on each count, the sentences to run concurrently (R. 50–51).

Upon appeal to the Circuit Court of Appeals for the Tenth Circuit, the judgment of the trial court was unanimously affirmed (R. 73–77) and a petition for rehearing denied (R. 79–82).

## ARGUMENT

### I

The petitioner contends that the trial court improperly overruled his "plea in bar and application for production of transcript of evidence" (Br. 16–23).

The plea in bar (R. 43–45) alleged that the petitioner had obtained immunity under Section 22 (c) of the Securities Act of 1933[1] because he was compelled, after a claim of privilege, to testify under

[1] Copied in petitioner's brief at page 20.

oath at proceedings conducted by representatives of the Securities and Exchange Commission as to matters which were a part of the subject matter of the subsequent prosecution. Included in this plea were an application that the trial court order the Government's representatives to produce and submit to the petitioner, upon payment of the cost thereof, a copy of the transcript of petitioner's testimony at such proceedings and prayers that the petitioner be heard on the merits of his plea, that the indictment be dismissed, and that the petitioner be discharged. Attached to the plea and application was a letter of the Assistant General Counsel of the Securities and Exchange Commission refusing to furnish a transcript of the testimony in question (R. 45–46). The Government filed a motion to strike the plea in bar and an objection to the production of the transcript (R. 46–47), in which the Government challenged the sufficiency of the plea and contested its allegations by denying that the petitioner obtained immunity. In support of its motion the Government filed therewith an affidavit of an officer of the Securities and Exchange Commission who was present at the proceedings heretofore mentioned, in which it was averred that the petitioner was not at any time sworn or placed under oath and was not at any time compelled to testify or give any information against himself or anyone else under oath or otherwise, and that the proceedings men-

tioned in his plea were recessed upon petitioner's claim of privilege (R. 47–49). While the petitioner moved to strike this affidavit as incompetent (R. 49), he did not controvert the truth of its averments nor those contained in the Government's motion to strike his plea. Both motions to strike, as well as the petitioner's plea in bar and application for the production of the transcript of testimony, were overruled (R. 49–50).

The rules of the Securities and Exchange Commission permit the furnishing to parties only of transcripts of "hearings" and not of "investigations" under the Securities Act of 1933, as amended (Rules IV and XVI, Appendix, *infra*, pp. 13–14). That these rules are fully justified by the statute and are reasonable in character has been recognized in *Woolley* v. *United States*, 97 F. (2d) 258, 262 (C. C. A. 9th), certiorari denied, 305 U. S. 614; *In re Securities and Exchange Commission*, 14 F. Supp. 417 (S. D. N. Y.),[2] affirmed 84 F. (2d) 316 (C. C. A. 2d), reversed on ground case was

[2] In this case it was said by the District Court (p. 418): "The hearing referred to in the Securities Exchange Act and in the rules of the Commission is a proceeding of relative formality, generally public, with definite issues of fact or of law to be tried, in which the parties proceeded against have a right to be heard. It is much the same as a trial. It may terminate in a final order. An investigation, on the other hand, is informal, preliminary, and usually private. It is conducted to determine whether grounds exist for taking more formal proceedings. There are no parties in any substantial sense, no definite issues. There is no right to be heard."

moot, 299 U. S. 504; *Securities and Exchange Commission* v. *Torr*, 15 F. Supp. 144 (S. D. N. Y.); and *United States* v. *Mascuch*, 30 F. Supp. 976 (S. D. N. Y.).[3]

The petitioner was consequently not entitled to a transcript of the proceedings before the Commission unless these proceedings were in the course of a "hearing" rather than during an "investigation." The plea in bar characterized the proceedings both as an "investigation" and as "hearings" (R. 44). The proceedings may well have been proceedings during the course of an investigation; petitioner made no definite showing that the proceedings took place during a hearing. In the absence of such a showing the court was justified in refusing his application for the production of a transcript.

The burden was, of course, upon the petitioner to establish the allegations of his plea in bar that he was compelled, after his claim of privilege, to testify under oath at the proceedings before the officers of the Securities and Exchange Commission. *Kastel* v. *United States*, 23 F. (2d) 156, 157 (C. C. A. 2d), certiorari denied, 277 U. S. 604; *United States* v. *Giles*, 19 F. Supp. 1009 (Okla.); see also *Lee* v. *United States*, 91 F. (2d) 326, 329 (C. C. A. 5th), certiorari denied, 302 U. S. 745. The Government had controverted these allega-

[3] A review of this decision is not sought in the petition for writ of certiorari now pending in the *Mascuch* case (No. 116, present Term).

tions by its motion to strike and by the affidavit annexed thereto of an officer of the Securities and Exchange Commission who was present at the proceedings. It therefore became incumbent upon the petitioner to introduce proof in support of the allegations of his plea, but the record is barren of such proof. Neither is there any showing in the record that the petitioner was denied any opportunity to adduce proof. Notwithstanding the fact that the attorney who represented the petitioner in the criminal trial was the attorney who appeared with him at the proceedings in question, the petitioner neither produced an affidavit of this attorney nor sought permission to have him testify. Likewise the record does not disclose that subpoenas were requested to secure the attendance of those officials of the Securities and Exchange Commission who were present at the proceedings. Since the petitioner failed to sustain the burden which rested upon him, his plea was, we submit, properly overruled.

The petitioner also contends (Br. 33–36) that the Circuit Court of Appeals erred in receiving in evidence, over his objection, an affidavit of an Assistant United States Attorney and the annexed transcript of the proceedings before the Commission (R. 55–72). He argues that the Circuit Court of Appeals was precluded from considering this affidavit and transcript because it was not a part of the record on appeal. Suffice it to say that there is nothing in the opinion of the

Circuit Court of Appeals which indicates that that court in anywise predicated its decision upon this affidavit and transcript. Indeed, if the court had relied upon the affidavit and transcript, it would not have decided merely that the petitioner had failed to establish the allegations of his plea in bar but that those allegations were contrary to the facts, since the transcript itself (R. 56–72) conclusively establishes that the petitioner was not compelled to testify before the Commission under oath or otherwise, after his claim of privilege, but was excused from testifying upon the assertion of his constitutional privilege. The court would likewise, of necessity, have also held that the proceedings in question were proceedings during the course of an investigation rather than a hearing.

II

Petitioner also contends that the Circuit Court of Appeals committed reversible error in holding that the three-year sentence imposed upon him was sustainable upon the basis of the conspiracy count, since the statute upon which that count was predicated permits a maximum of only two years' imprisonment (Appendix, *infra*, p. 11). We submit that this error does not require the remanding of the case to the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals points out (R. 75) that the conspiracy count "was attacked on the single ground of failure to charge that the securities were not of the class exempted

under section 3 of the Securities Act, as amended". (Appendix, *infra*, pp. 12–13). The Court answered that attack by stating (R. 75):

> * * * It is clear from the face of the count that the securities described therein do not come within the classes described in the statute. Ordinarily an exception created by a proviso or other distinct or substantive clause of a criminal statute need not be negatived in an indictment. One relying upon such an exception must set it up and establish it. *Ledbetter* v. *United States*, 170 U. S. 606; *McKelvey* v. *United States*, 260 U. S. 353; *Nicoli* v. *Briggs*, 83 F. (2d) 375; *Knight* v. *Hudspeth*, (10th) 112 F. (2d) 137, decided May 20, 1940. And an indictment charging a conspiracy to violate a statute need not negative an exception contained in such statute either by proviso or other distinct or substantive provision. *Manning* v. *United States*, 275 F. 29. * * *

The cases upon which the court relies clearly support its view.[4]

Since the only ground of attack which the petitioner specifically makes against counts 4 and 5,

[4] The cases under the Harrison Narcotic Act which petitioner cites are clearly not in point. Those cases hold that under that Act it is not sufficient merely to charge that the accused possessed narcotics; that it must also be alleged that he was a person who was required under the statute to register. The indictment in the instant case did not merely allege a sale of securities but a sale without registration. The Harrison Act specifically provides (U. S. C. Title 28, Sections 1387–1388 (c)), in accordance with the well recognized rule applied by the court in the instant case, that the indictment need not negative the statutory exemptions.

which counts would support the three-year sentence,[5] is the same which he levelled at the conspiracy count (Br. 26–29), the court necessarily would have made the same holding if it had selected either of those counts instead of the conspiracy count. Petitioner consequently was in nowise prejudiced by the error of the Circuit Court of Appeals and the remanding of the case would serve no useful purpose.[6]

## CONCLUSION

The case was correctly decided below. There exists no conflict of decisions and there is involved no important question of Federal law. We therefore respectfully submit that the petition for writ of certiorari should be denied.

FRANCIS BIDDLE,
*Solicitor General.*
O. JOHN ROGGE,
*Assistant Attorney General.*
WILLIAM W. BARRON,
J. ALBERT WOLL,
*Special Assistants to the Attorney General.*
WILLIAM J. CONNOR,
GEORGE F. KNEIP,
W. MARVIN SMITH,
*Attorneys.*

SEPTEMBER 1940.

---

[5] See Section 24 of the Securities Act (Appendix, *infra*, p. 13.)

[6] While the petition contends generally that the indictment did not indicate that it was signed by the foreman of the grand jury, and, therefore, was defective, the lack of merit in this contention is amply demonstrated by the opinion of the Circuit Court of Appeals (R. 76).

# APPENDIX

## STATUTES AND RULES INVOLVED

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88):

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 215 of the Criminal Code (U. S. C., Title 18, Sec. 338):

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement * * * in any post office, or station thereof * * * to be sent or delivered by the post-office establishment of the United States * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

Section 17 (a) of the Securities Act of 1933 (U. S. C., Title 15, Sec. 77q):

> (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or * * *

* * * * * *

Section 5 (a) of the Securities Act of 1933, as amended (U. S. C., Title 15, Sec. 77e):

> (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

* * * * *

Section 3 of the Securities Act of 1933, as amended (U. S. C., Title 15, Sec. 77c) so far as pertinent,

> (a) Except as hereinafter expressly provided, the provisions of this sub-chapter

shall not apply to any of the following classes of securities;

(Then follows the various classes of securities which are exempt.)

Section 24 of the Securities Act of 1933 (U. S. C., Title 15, Sec. 77x):

> Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

Rule IV [1] of the Rules of Practice promulgated by the Securities and Exchange Commission:

* * * * *

> (c) Hearings shall be stenographically reported and a transcript thereof shall be made which shall be a part of the record of the proceeding. Transcripts will be supplied to the parties by the official reporter at such rates as may be fixed by contract between the Commission and the reporter.

Rule XVI [2] of the Rules of Practice promulgated by the Securities and Exchange Commission:

---

[1] Rule IV of the Rules of Practice, as amended November 4, 1936, is now contained in substance in Rule V (c) of the Rules of Practice, as amended December 1, 1939.

[2] Rule XVI of the Rules of Practice, as amended November 4, 1936, is now contained in substance in Rule XIX of the Rules of Practice, as amended December 1, 1939.

These Rules shall not be applicable to investigations conducted by the Commission pursuant to Sections 8 (e), 19 (b), and 20 (a) of the Securities Act of 1933, as amended; Sections 21 (a) and 21 (b) of the Securities Exchange Act of 1934, as amended; or Sections 11 (a), 13 (g), 18 (a), 18 (b), 18 (c), and 30 of the Public Utility Holding Company Act of 1935.

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No. 577

# In the Supreme Court of the United States

OCTOBER TERM, 1940

HIRAM K. EDWARDS, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

BRIEF FOR THE UNITED STATES

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# In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 377

HIRAM R. EDWARDS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 69–73) is reported in 113 F. (2d) 286.

### JURISDICTION

The judgment sought to be reviewed was entered June 29, 1940 (R. 73). A petition for rehearing (R. 75–78) was denied July 22, 1940 (R. 78). The petition for writ of certiorari was filed August 26, 1940, and granted October 14, 1940 (R. 79). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the

Rules of Practice and Procedure in Criminal Cases, promulgated by this Court on May 7, 1934.

## QUESTIONS PRESENTED

Petitioner pleaded *nolo contendere* to an indictment containing ten substantive counts and one conspiracy count, and was sentenced to three years imprisonment on each count, the sentences to run concurrently. The questions are:

1. Whether the "plea in bar" filed by petitioner states facts sufficient, if proved, to establish his immunity from prosecution on the ground that, after a claim of privilege, he was compelled to testify against himself in an investigation conducted by the Securities and Exchange Commission.

2. If the plea in bar is sufficient on its face, whether petitioner was denied an opportunity to prove his plea and, in particular, whether the District Court's refusal to order production of transcripts of petitioner's testimony before the Securities and Exchange Commission constituted a denial of such an opportunity.

3. If the District Court should have ordered production of the transcripts or should itself have examined the transcripts, whether its failure to do so constituted reversible error.

4. Whether the Circuit Court of Appeals erred in receiving an affidavit filed by the Government, and transcripts of petitioner's testimony before the Securities and Exchange Commission, and, if so, whether the error was prejudicial to petitioner.

5. Whether the fact that the Circuit Court of Appeals, in rejecting petitioner's contention that the indictment was invalid, confined itself to ruling that the conspiracy count (which alone would not support a three-year sentence) was valid constitutes reversible error, where the objections raised by petitioner to the conspiracy count comprehend all of the objections raised by petitioner which are applicable to counts 4 and 5 of the indictment, each of these counts being sufficient to support the sentence imposed.

6. Whether the indictment is valid.

7. Whether this Court has power to correct the error of the District Court in imposing a three-year sentence on the conspiracy count.

## STATUTES AND RULES INVOLVED

The pertinent provisions of the statutes involved, as well as the applicable Rules of the Securities and Exchange Commission, are printed in the Appendix, *infra*, pp. 48–52.

## STATEMENT

On November 15, 1938, an indictment in eleven counts was returned in the United States District Court for the Western District of Oklahoma against the petitioner and another (R. 4–39).[1] The first three counts of the indictment charge the

[1] The case was dismissed as to petitioner's co-defendant on January 29, 1940, on motion of the United States Attorney (R. 50).

defendants with violating the fraud provisions (Secs. 17 (a) (1) and (2)) of the Securities Act of 1933, as amended (15 U. S. C. § 77q (a)). Counts four and five charge violations of the registration provisions (Secs. 5 (a) (1) and (2)) of that Act (15 U. S. C. § 77e). Counts six to ten charge violations of the mail fraud statute (Criminal Code, Sec. 215; 18 U. S. C. § 338); and the eleventh count charges a conspiracy in violation of Section 37 of the Criminal Code (18 U. S. C. § 88) to commit the offenses charged in the first ten counts. Petitioner pleaded *nolo contendere* to the indictment (R. 49) and was sentenced to imprisonment for a term of three years on each count, the sentences to run concurrently (R. 49–50).

All the substantive counts of the indictment except counts four and five charge the defendants with devising a scheme to defraud various named persons and using the mails in aid of that purpose. The material facts outlining the scheme are found in the first count (R. 5–11). It appears from the allegations in this count that the defendants acquired interests in four oil and gas leases in Oklahoma and Texas and organized five trusts under the laws of Oklahoma to hold title to the leases. In order to sell "beneficial interests" in the trusts, defendants issued various pamphlets, letters, and circulars describing the property owned and the possibilities of reaping large profits from the operation of oil and gas wells. A constant flow of

these pamphlets and letters from June 1936, to February 1937, developed a glowing picture of great expectations actually being realized. The indictment alleges misrepresentations varying from extravagant and unwarranted hopes to specific misstatements of fact, all made with the intent of defrauding prospective purchasers of the shares.

Typical of the representations which are alleged to have been false and known to the defendants to have been false are the following: that a well on property adjoining the Lucky Indian lease, belonging to the H. R. Edwards Comanche County, Oklahoma, Trust, had been completed as a "200-barrel per day well" (R. 8); that "Lucky Indian" had been proven for commercial production (R. 8); that a well drilled on the property of the Comanche County Trust was a good commercial gas well (R. 8); that almost pure oil had been taken from a well on the property (R. 9); that property of the Indian Chief Trust, organized by petitioner, was proven for production of oil and gas and that this property was surrounded on three sides by producing wells (R. 9); that tests disclosed that commercial production in large quantities on Indian Chief property was feasible and that high gas pressure had been found under the property (R. 10). The completed picture depicted in the pamphlets was that of a large area of rich oil-bearing property owned by the trusts, completely surrounded by proven fields. The description of the properties

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was interlarded with promises of immediate huge profits to purchasers of "interests" and exhortations to hurry with orders for such "interests" before they were all gone. A letter to Willard W. Penry, set out in full in the third count (R. 13–22), gives a clear picture of the type of fraud with which the indictment charges the defendants.

The indictment alleges that, in fact, the properties owned by the trusts were not adjacent to the producing fields but were separated from them by a sterile area in which wells had been sunk and abandoned as "dry holes" (R. 23, 24). The indictment also alleges that the properties owned by defendants' trusts were wholly lacking in possibility of oil or gas production.

Counts four and five of the indictment charge the defendants with wilfully using the mails in the sale, and delivery after sale, of certificates of beneficial interests in one of the trusts, in violation of Sections 5 (a) (1) and (2) of the Securities Act of 1933, as amended. These counts allege that the certificates were of the class and character of securities defined by Section 2 of the Securities Act and that the defendants had sold them, and delivered them after sale, at a time when there was not in effect a registration statement covering such certificates filed with the Securities and Exchange Commission under the provisions of Section 5 (a) of the Securities Act.

On December 17, 1938, petitioner was arraigned and entered a plea of not guilty (R. 49). On March

1, 1939, he was granted leave to withdraw his plea of not guilty and presented a demurrer to the indictment (R. 48). In this demurrer, which was filed on December 16, 1938 (R. 39), petitioner attacked the validity of the indictment as a whole and the sufficiency of each of its counts (R. 39–41). The demurrer was overruled by the District Court and petitioner then re-entered his plea of not guilty (H. 48).

On December 16, 1938, petitioner also filed a "Plea in Bar and Application for Production of Transcript of Evidence" (R. 41–44). In this plea, petitioner alleged that on three different occasions he had appeared before an officer of the Securities and Exchange Commission in response to *subpoenas duces tecum* and—

> after having claimed his immunity against self incrimination, as provided by law and the Constitution of the United States, under compulsion, testified under oath, pursuant to various questions propounded and asked him by said officer of said Commission, said testimony concerning said defendant's identity and relationship to various trusts and organizations which are the subject matter of this prosecution and concerning divers and sundry other matters pertaining to the matters which are the subject of this prosecution, and particularly to the personal entries, books and records of said defendant, which are a part of the subject matter of this prosecution. (R. 42.)

The petitioner further alleged that by reason of having been compelled to testify against himself, after claiming his privilege, he was immune from prosecution under the Constitution and under Section 22 of the Securities Act (15 U. S. C., § 77 v (c)).

The pleading also contained an "Application for Production of Transcript of Evidence" in which petitioner asked the District Court to order the Securities and Exchange Commission to produce and to submit to him a transcript of his testimony before the Commission. He alleged that production of this transcript was necessary in order to allow him to present, and the court to pass upon, the plea in bar.

The pleading ends with a prayer that the transcript be produced and submitted to petitioner, that petitioner be heard on the merits of his plea in bar, and that the prosecution be barred and the indictment dismissed by virtue of the alleged compulsory self-incrimination. The pleading was verified by the petitioner. Attached to it as an exhibit was a letter from the General Counsel of the Securities and Exchange Commission to petitioner's attorney, refusing a request by the attorney for a transcript of the testimony taken by the Commission. The letter states in part (R. 44):

> Inasmuch as the evidence adduced by the Commission in the course of its investigation was transmitted to the Attorney General for

> criminal prosecution and an indictment has been returned, this Commission does not feel it proper to make available to the defendant the testimony taken from witnesses which may be used by the Government in the prosecution of its case * * *.

On February 28, 1939, counsel for the Government filed a pleading entitled "Motion to Strike Plea In Bar and Objection To Production of Transcript of Evidence" (R. 45–46). In that pleading, the Government alleged that the plea in bar was insufficient on its face and denied that the petitioner had been compelled to give any information against himself under oath or otherwise. To this pleading was attached an affidavit executed by an attorney for the Securities and Exchange Commission who had participated in all of the proceedings at which the petitioner had appeared before an officer of the Commission pursuant to the *subpoenas duces tecum* referred to in the plea at bar (R. 46–47). This affidavit states that on no occasion was the petitioner sworn or placed under oath by an officer of the Commission, that he was not compelled to testify or give any information against himself or anyone else under oath or otherwise, and that the proceedings on each occasion were recessed shortly after the petitioner had interposed his plea of immunity.

On March 1, 1939, petitioner filed a motion to strike this affidavit (R. 48). On the same day the parties appeared by their respective counsel before

the District Court (R. 48). The court overruled petitioner's plea in bar and application for production of the transcript of evidence. It also overruled the Government's motion to strike the plea in bar and its objections to the production of the transcript and it similarly overruled petitioner's motion to strike the affidavit attached to the Government's motion (R. 48).

On October 25, 1939, petitioner withdrew his plea of not guilty and entered a plea of *nolo contendere* to each count (R. 49). He was thereupon sentenced to imprisonment for a term of three years on each count, the sentences to run concurrently (R. 49–50).

Petitioner then took an appeal to the court below (R. 50–51). On May 20, 1940, a brief was filed on his behalf in that court, reading in part as follows (p. 15):

> *We wonder if this Court would not like to see the transcript of the testimony of Appellant before the Commission showing his compulsion, his claim of immunity, and his testimony against himself in order that the truth might be known.* [Italics in original.]

The case came on for argument before the court below on June 19, 1940. At that time, at the instance of the Government and over the objection of the petitioner, the court received and filed an affidavit of one John Brett, an Assistant United States Attorney, and transcripts of the proceed-

ings before the Securities and Exchange Commission at which the petitioner had appeared. In his affidavit, Brett stated that at the hearing before the District Court on March 1, 1939, on defendant's plea in bar and application for the production of the transcripts, counsel for the Government had stated to the court that they had the transcripts of the proceedings before the Commission, and that "if the government's affidavit was not sufficient, the government would offer them in evidence if the Court desired to examine them; that upon being so advised, His Honor, Judge Vaught, stated that he did not care to see the transcripts, that he did not need them to pass upon said plea in bar, and that he was going to overrule the defendant's plea in bar" (R. 52–53).

The transcripts of the testimony filed in the court below (R. 53–69) show that each time the petitioner appeared before an officer of the Securities and Exchange Commission, he claimed his privilege against self-incrimination and was thereupon dismissed without testifying. They further disclose that none of the petitioner's books or records was introduced in evidence or examined by any representative of the Commission.

## SUMMARY OF ARGUMENT

### I

The plea in bar is insufficient on its face. It states only that petitioner was forced to testify,

after claiming his privilege against self incrimination, concerning two things: (1) his identity and relationship to various trusts and organizations which are the subject matter of the prosecution; and (2) "divers and sundry other matters pertaining to the matters" which are the subject of the prosecution, and particularly concerning his "personal entries, books, and records * * * which are a part of the subject matter of this prosecution." The plea does not state what "other matters" petitioner was forced to testify to and it does not state that these other matters tended to incriminate petitioner or led to the discovery of his crime; it states only that they were "matters pertaining to the matters which are the subject of this prosecution." Further, the plea does not allege the nature of the testimony which petitioner was forced to give concerning these other matters or concerning his personal records, and it does not allege that petitioner's personal records were introduced in evidence in the proceedings or even examined by any representative of the Securities and Exchange Commission. Such a plea is plainly insufficient and was therefore properly overruled by the District Court.

## II

Even assuming the plea to be sufficient, it was properly overruled because of petitioner's failure to prove its allegations. The burden of proof being on the petitioner, it was incumbent upon him to

introduce distinct evidence to establish the plea. This he failed to do. He neither introduced evidence in support of his plea nor did he offer to introduce such evidence, and, despite the assertions to the contrary in his brief, the record fails to show that he was denied an opportunity to present proof.

## III

The District Court did not err in refusing petitioner's application for transcripts of his testimony before the Securities and Exchange Commission.

1. If, as we contend, the plea is insufficient on its face, it is plain that the application was properly overruled. Petitioner sought the transcripts for the sole purpose of helping him prove his plea; the process of the court was not available to him for this purpose if the plea was insufficient.

2. Even if the plea be deemed sufficient, production of the transcripts was not necessary in order to enable petitioner to establish his plea. Other means were readily available to him to sustain his position. He could have taken the stand himself and testified under oath as to the testimony which he had been compelled to give. His attorney could also have given similar testimony since the attorney was present at all the proceedings before the Commission. And petitioner could have called as a witness any of the Commission's representatives who had participated at those proceedings. In the

absence of any effort on petitioner's part to adduce proof by any of these readily available means, the refusal of the District Court to order production of the transcripts cannot be considered as error, much less as reversible error.

3. The Rules of Practice of the Securities and Exchange Commission do not confer upon petitioner a right to the transcripts. These Rules specifically provide that transcripts shall be furnished to parties to "hearings" conducted by the Commission, but they have no application to transcripts of testimony taken during the course of an "investigation," such as that here involved.

4. The general rules of law governing the availability to defendants in criminal cases of documents or the minutes of investigatory proceedings which are in the hands of the prosecution likewise do not establish petitioner's right to the transcripts. An application for the production of such documents or minutes is addressed to the discretion of the trial court and the court will not, in the exercise of its discretion, grant the application unless the defendant makes a *prima facie* showing that the documents or minutes are necessary in the furtherance of justice; where there is some reason of policy why the document or minutes should remain confidential, a more persuasive showing of need for them will be required before production or inspection will be ordered than would otherwise be the case. Applying these principles to the case

at bar, it is clear that the District Court did not abuse its discretion in refusing to order production of the transcripts.

Moreover, even if it be held that the refusal of the District Court to inspect the transcripts was error, the error was plainly not prejudicial, for examination of the transcripts would simply have confirmed the insubstantiality of petitioner's plea in bar and would necessarily have resulted in the overruling of that plea.

## IV

The action of the court below in receiving and filing the transcripts of testimony did not constitute reversible error. Even if we assume that the court below did err in this regard, the error was clearly not prejudicial. For the reasons already stated, the record, apart from the transcripts, establishes that the District Court properly overruled the plea in bar. Consequently, irrespective of the transcripts, the court below was required to affirm. Affirmance being in any event required, the fact that the court may have erroneously relied for its decision upon transcripts improperly received cannot be considered reversible error any more than if the court had used erroneus reasoning to reach a correct result. Moreover, the opinion rendered by the court below plainly indicates that its decision was in no way predicated upon the transcripts.

In our view, however, the action of the court below in receiving the transcripts was entirely proper. The only possible error of the District Court was in not looking at the transcripts itself; even if this were error, reversal would be called for only if the error were prejudicial. On the question of prejudice, we believe that the court below could, and this Court can, properly examine the transcripts. This question does not depend on issues of fact determinable in the first instance by the trial court; the Circuit Court of Appeals and this Court are plainly as competent as the District Court to determine that, on their face, the transcripts furnish no support for petitioner's plea. In these circumstances, there is no reason why the court below should not itself have examined the transcripts instead of remanding the case for the District Court to examine them. Such a remand would have been a purely formal and useless gesture since it was manifest that, after its examination, the District Court would have had to take the same action with respect to the plea as it took before.

## V

The action of the court below in basing its affirmance of the judgment of conviction upon the validity of the conspiracy count, which alone does not support a three-year sentence, does not constitute reversible error. The grounds upon which the petitioner attacked the conspiracy count include

all the objections which he raised which are applicable to counts four and five of the indictment, each of which counts is sufficient to support the three-year sentence. Consequently, in passing upon the objections which petitioner raised to the conspiracy count, the court below likewise passed upon all the applicable objections to counts four and five.

VI

All of the objections raised by the petitioner to the validity of the indictment are insubstantial, if not capricious.

VII

The error of the District Court in imposing a three-year sentence on the conspiracy count, for which the maximum sentence provided by statute is two years, may be corrected by this Court or by the District Court on remand.

## ARGUMENT

### I

### THE PLEA IN BAR IS INSUFFICIENT ON ITS FACE AND WAS THEREFORE PROPERLY OVERRULED

There is, of course, no dispute that if petitioner had pleaded and proved that he was forced to testify against himself before an officer of the Securities and Exchange Commission concerning the subject matter of the indictment, he would have been entitled to have the indictment dismissed. Section 22 (c) of the Securities Act of 1933 (15 U. S. C. § 77v (c)) provides that no person shall

be excused from testifying before an officer of the Commission on the ground that his testimony might tend to incriminate him, but that—

> no individual shall be prosecuted * * * for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.[2]

It is the position of the Government that the allegations of petitioner's plea in bar do not state facts sufficient to show that petitioner was entitled to the statutory amnesty, and that, even if the plea in bar be deemed sufficient, petitioner has failed either to prove the allegations of his plea or to establish that he was denied an opportunity to prove them.

The allegations of the plea concerning the alleged self-incrimination (R. 42) state that petitioner on three different occasions appeared before an officer of the Securities and Exchange Commission in response to subpoenas *duces tecum* and—

> after having claimed his immunity against self-incrimination, as provided by law and

[2] The amnesty thus granted, as this Court held in construing an identical statutory provision in *Heike* v. *United States*, 227 U. S. 131, 142, is to be construed, so far as possible, "as coterminus with what otherwise would have been the privilege of the person concerned" under the Fifth Amendment.

> the Constitution of the United States, under compulsion, testified under oath, pursuant to various questions propounded and asked him by said officer of said Commission, said testimony concerning said defendant's identity and relationship to various trusts and organizations which are the subject matter of this prosecution and concerning divers and sundry other matters pertaining to the matters which are the subject of this prosecution, and particularly to the personal entries, books and records of said defendant, which are a part of the subject matter of this prosecution.

It will be noted that the plea states only that petitioner was forced to testify, after claiming his privilege, concerning two things: (1) his identity and relationship to various trusts and organizations which are the subject matter of the prosecution; and (2) "divers and sundry other matters pertaining to the matters" which are the subject of the prosecution, and particularly concerning his "personal entries, books and records * * * which are a part of the subject matter of this prosecution." The plea does not state what "other matters" petitioner was forced to testify to, it does not state the nature of the testimony he was forced to give concerning these other matters or concerning his personal records, and it does not allege that petitioner's personal records were introduced in evidence in the proceedings or even examined by any representative of the Securities and Exchange

Commission. Such a plea, we submit, is plainly insufficient on its face.

The decision of this Court in *Heike* v. *United States*, 227 U. S. 131, is persuasive authority in support of our position. There the petitioner had been indicted for frauds on the revenues accomplished by a certain sugar company through the secret introduction of springs in the company's scales so as to reduce the apparent weight of imported sugar. The petitioner pleaded in bar to this indictment that he had been compelled to testify against himself before a federal grand jury investigating alleged violations of the Sherman Act by the sugar company, and that, therefore, he was entitled to the statutory amnesty provided by the Sherman Act. A trial was had on this plea, at which it was shown that the petitioner had appeared before the grand jury, had testified as to his identity and as to his official relationship to the sugar company, and had produced certain checks signed by him and a table summarizing the operations of the company, which had been compiled from the company's books at his direction. On the basis of this evidence, the trial court directed a verdict for the Government on the plea in bar and this Court affirmed. The Court held that petitioner's testimony as to his identity and his relationship to the sugar company, although facts relevant to the indictment against him, did not have such a tendency to incriminate him as to entitle

him to immunity. With respect to the checks and the summary of operations, the Court, holding that these documents did not constitute evidence concerning the subject matter of the indictment, stated (227 U. S. at 144): "When the statute speaks of testimony concerning a matter it means concerning it in a substantial way, just as the constitutional protection is confined to real danger and does not extend to remote possibilities out of the ordinary course of law." Cf. *Mason* v. *United States*, 244 U. S. 362.

Under the holding of the *Heike* case, it is plain that the allegation of the plea in bar in the present case to the effect that petitioner was compelled to testify, after claiming privilege, as to his "identity and relationship to various trusts and organizations which are the subject matter of this prosecution," does not state facts sufficient to entitle him to immunity. And the same is true, we submit, with respect to the allegation concerning the "divers and sundry other matters" concerning which petitioner alleges he was forced to testify. The plea does not state that these matters tended to incriminate the petitioner or led to the discovery of his crime; it states only that they were "matters pertaining to the matters which are the subject of this prosecution." Such an allegation is plainly insufficient, particularly in view of the fact that the petitioner, who verified the plea, must have known, in a general way at least, the matters concerning which he

testified, and that petitioner's attorney, who signed the plea, was present at all the proceedings at which the alleged testimony was given (R. 46–47, 53–69). Cf. *Holt* v. *United States*, 218 U. S. 245; *Hillman* v. *United States*, 192 Fed. 264 (C. C. A. 9th).

Examination of the transcripts of petitioner's testimony before the Securities and Exchange Commission [3] reveals how subtly the plea in bar was drawn so as to give a semblance of substance to a wholly insubstantial claim of immunity. The actual testimony given by the petitioner was confined to the statements, not made under oath, that he had brought with him all of the available books and records of the various trusts called for by the *subpoenas duces tecum* served upon him (R. 55, 59); that these books and records contained entries relating to his own personal affairs as well as to the affairs of the trusts (R. 56); that the personal entries could not be segregated from the trust entries (R. 57–58, 62, 67); and that the books had been audited (R. 56). Petitioner having claimed his privilege against self-incrimination, the books were not introduced in evidence or examined by any representative of the Securities and Exchange Commission.

Although this testimony plainly does not entitle petitioner to the statutory amnesty, it was, none-

[3] For the reasons stated below (pp. 37–40), we believe that this transcript is properly part of the record before this Court, even though it was not introduced in evidence in the District Court.

theless, in the words of the plea in bar, testimony concerning "matters pertaining to the matters which are the subject of this prosecution, and particularly to the personal entries, books and records of said defendant, which are a part of the subject matter of this prosecution." This demonstrates conclusively, we believe, that the allegations of the plea do not state facts sufficient, even if proved, to establish petitioner's claim of immunity. Accordingly, the action of the District Court in overruling the plea was clearly correct.

## II

### EVEN IF THE PLEA IN BAR BE DEEMED SUFFICIENT ON ITS FACE, IT WAS PROPERLY OVERRULED BECAUSE OF PETITIONER'S FAILURE TO PROVE ITS ALLEGATIONS

Even assuming the plea to be sufficient on its face, it was properly overruled by the District Court because of petitioner's failure to prove its allegations. The Government having controverted the plea, the burden of proof was, of course, on the petitioner. *Nardone* v. *United States*, 308 U. S. 338, 341; *Martin* v. *Texas*, 200 U. S. 316; *Brownfield* v. *South Carolina*, 189 U. S. 426; *Tarrance* v. *Florida*, 188 U. S. 519; *Smith* v. *Mississippi*, 162 U. S. 592; *Lee* v. *United States*, 91 F. (2d) 326, 329 (C. C. A. 5th); *Mulloney* v. *United States*, 79 F. (2d) 566, 575 (C. C. A. 1st). Petitioner failed utterly to sustain this burden, since he neither introduced nor offered to introduce any proof in support of his plea.

It is firmly established that the facts stated in the plea, even though the plea itself is verified, cannot be used as evidence to establish those facts. *Smith* v. *Mississippi, supra; Tarrance* v. *Florida, supra; Martin* v. *Texas, supra; Mamaux* v. *United States,* 264 Fed. 816, 819 (C. C. A. 6th). In order to sustain the burden of proof, it is incumbent upon the defendant to introduce, or offer to introduce, distinct evidence to establish his plea (*id.*). Here there was neither proof nor offer of proof, and consequently, unless petitioner can show that he was denied an opportunity to offer proof,[4] the order of the District Court overruling the plea must be affirmed.

Petitioner asserts in his brief at various places that he was denied an opportunity to offer proof (Br. 5, 10, 16–17, 22), but the record fails to bear out the assertion. It is true that the plea in bar does contain a prayer that petitioner "be heard on the merits of this plea" (R. 44), but this Court has specifically held that such a prayer is of no avail in the absence of an actual offer of proof. *Martin* v. *Texas,* 200 U. S. 316, 319; see also *Brownfield* v. *South Carolina,* 189 U. S. 426, 429; *Mamaux* v. *United States,* 264 Fed. 816, 819 (C. C. A. 6th). And the record furnishes no support for any con-

[4] It is clear, of course, that a denial of opportunity to offer proof in support of the plea would constitute reversible error. *Martin* v. *Texas,* 200 U. S. 316, 319; *Carter* v. *Texas,* 177 U. S. 442, 448; *Mamaux* v. *United States,* 264 Fed. 816, 819 (C. C. A. 6th).

tention that petitioner made an actual offer of evidence which was rejected, or that the District Court failed to give him an opportunity to offer such evidence. Since the burden of establishing lack of opportunity to offer proof is on petitioner, the silence of the record must be taken against him. This Court has expressly ruled that, in the absence of an affirmative showing in the record that the defendant was denied an opportunity to offer proof, it must be assumed that he did have such an opportunity. *Martin* v. *Texas, supra; Brownfield* v. *South Carolina, supra;* see also *Mamaux* v. *United States, supra;* cf. *Smith* v. *Mississippi, supra.*

## III

### THE REFUSAL OF THE DISTRICT COURT TO ORDER PRODUCTION OF THE TRANSCRIPTS OF TESTIMONY DID NOT CONSTITUTE A DENIAL OF OPPORTUNITY TO OFFER PROOF

1. If, as we contend, the plea is insufficient on its face, it is plain that the District Court properly denied petitioner's application for production of the transcripts of the testimony which petitioner gave during the course of the Securities and Exchange Commission investigation. Petitioner sought these transcripts for the sole purpose of helping him prove his plea; certainly the process of the court was not available to him for this purpose if the plea was insufficient on its face.

2. Even if the plea be deemed sufficient on its face, it can scarcely be contended that production

of the transcripts was necessary in order for petitioner to establish his plea or that the District Court's refusal to order their production constituted, *per se*, a denial of opportunity to offer proof. Other means were readily available to petitioner to sustain his position. He could have taken the stand himself and testified under oath as to the testimony which he had been compelled to give during the Securities and Exchange Commission investigation.[5] His attorney could also have given similar testimony, since the attorney was present at all the proceedings before the Commission (R. 46–47, 53–69). And petitioner could have called as a witness any of the Commission's representatives who had participated at those proceedings.

In the absence of any effort on petitioner's part to adduce proof of the facts stated in his plea by any of these readily available methods of proof, we submit that the refusal of the District Court to order production of the transcripts cannot be considered as error, much less as reversible error. As we show below, petitioner's failure to establish a

[5] The verification of the plea in bar by petitioner cannot be treated as the equivalent of his taking the stand and testifying since, as we have pointed out, such a verification does not constitute proof of the facts stated in the plea (p. 24, *supra*). This rule has a firm practical basis. The plea sets forth an incomplete and *ex parte* story; called to the stand as a witness, petitioner would have been subject to cross-examination as to precisely what had occurred during the course of the Commission's investigation.

*prima facie* case by adducing such proof justified the District Court, in the exercise of its discretion, to refuse the application for production of the transcripts (see pp. 29–34, *infra*). And, even if it be held that it would have been better practice for the District Court to have granted the application, the availability of these other methods of proof shows that its failure to do so did not deny the petitioner an opportunity to prove his case.

3. Petitioner relies, in part, for his alleged right to secure transcripts of his testimony before the Securities and Exchange Commission upon Rule IV (c) of the Rules of Practice promulgated by the Commission (Code of Federal Regulations, Vol. 17, § 201.4 (c)). This Rule provides as follows:

> Hearings shall be stenographically reported and a transcript thereof shall be made which shall be a part of the record of the proceeding. Transcripts will be supplied to the parties by the official reporter at such rates as may be fixed by contract between the Commission and the reporter.

This Rule is of no avail to petitioner since it relates only to "hearings" and not to "investigations." Rule XVI of the Commission's Rules of Practice specifically provides that the Rules do not apply to investigations.[6] That these Rules are fully

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[6] Rule XVI, as amended November 4, 1936, is now contained in substance in Rule XIX of the Rules of Practice, as amended December 1, 1939. See Code of Federal Regulations, Vol. 17, § 201.16.

justified by the statute and are reasonable in character has been recognized in *Woolley* v. *United States*, 97 F. (2d) 258, 262 (C. C. A. 9th), certiorari denied, 305 U. S. 614; *In re Securities and Exchange Commission*, 14 F. Supp. 417 (S. D. N. Y.),[7] affirmed 84 F. (2d) 316 (C. C. A. 2d), reversed as moot, 299 U. S. 504; and *United States* v. *Maschuch*, 30 F. Supp. 976 (S. D. N. Y.), affirmed, 111 F. (2d) 602 (C. C. A. 2d), certiorari denied, October 14, 1940, No. 116, present Term.

Petitioner alleges in his brief (pp. 14–15, 22) that he was entitled to the transcript under Rule IV (c) because his plea refers to the Commission proceedings as "hearings." But the plea also refers to those proceedings as an "investigation" (R. 42). And a letter to defendant's attorney from the General Counsel of the Commission, attached as an exhibit to the plea (R. 44–45), likewise refers to the proceedings as an investigation. The plea it-

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[7] In this case it was said by the District Court (p. 418): "'The hearing referred to in the Securities Exchange Act and in the rules of the Commission is a proceeding of relative formality, generally public, with definite issues of fact or of law to be tried, in which the parties proceeded against have a right to be heard. It is much the same as a trial. It may terminate in a final order. An investigation, on the other hand, is informal, preliminary, and usually private. It is conducted to determine whether grounds exist for taking more formal proceedings. There are no parties in any substantial sense, no definite issues. There is no right to be heard. * * *"

self therefore fails to state a case coming within Rule IV (c). Moreover, petitioner, who had the burden of proof, failed to offer any evidence to establish that the proceedings were in fact hearings.[8]

In this state of the record, it is plain that petitioner cannot rely upon the Commission's Rules to establish his alleged right to production of the transcripts of testimony. His right, if any, must depend rather upon the general rules of law governing the availability to defendants in criminal cases of documents or the minutes of investigatory proceedings which are in the hands of the prosecution.

4. On this aspect of criminal procedure, the law is in a state of extreme confusion. See the discussion of the problem by Mr. Justice (then Judge) Cardozo in *People ex rel. Lemon* v. *Supreme Court*, 245 N. Y. 24; see also (1939) 39 Col. L. Rev. 287. Nevertheless, several of the guiding principles may be stated with some degree of certainty: (1) an application by a defendant for the production of a document in the hands of the prosecution, or for inspection of the minutes of investigatory proceedings, is addressed to the discretion of the trial court;[9] (2) the court will not, in the exercise of its

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[8] Petitioner could not, of course, have proved that the proceedings were hearings since, as shown by the transcripts introduced in the Circuit Court of Appeals (R. 53–69), they were, in fact, parts of an investigation.

[9] *Metzler* v. *United States*, 64 F. (2d) 203 (C. C. A. 9th); *Murdick* v. *United States*, 15 F. (2d) 965 (C. C. A. 8th); *United States* v. *Violon*, 173 Fed. 501 (S. D. N. Y.); *United*

discretion, order the production of such a document or the inspection of such minutes unless the defendant makes a *prima facie* showing that this is necessary in the furtherance of justice;[10] and (3) where there is some reason of policy why the document or minutes should remain confidential, a more persuasive showing of need for them on the part of the defendant will be required before production

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*States* v. *Perlman*, 247 Fed. 158 (S. D. N. Y.); *United States* v. *Silverthorne*, 265 Fed. 853 (W. D. N. Y.); *United States* v. *Garsson*, 291 Fed. 646 (S. D. N. Y.); *United States* v. *Herzig*, 26 F. (2d) 487 (S. D. N. Y.); *United States* v. *Oley*, 21 F. Supp. 281 (E. D. N. Y.); *Kirkpatrick* v. *Pope Mfg. Co.*, 61 Fed. 46 (D. Conn.); *United States* v. *Price*, 163 Fed. 904 (S. D. N. Y.); *State ex rel. Robertson* v. *Steele*, 117 Minn. 384, 135 N. W. 1128; *Commonwealth* v. *Bartolini*, 299 Mass. 503, 13 N. E. (2d) 382; *State* v. *Di Noi*, 59 R. I. 348, 195 Atl. 497; *Massie* v. *People*, 82 Colo. 205, 258 Pac. 226; *State* v. *Fitzgerald*, 130 Mo. 407, 32 S. W. 1113; *People* v. *Gatti*, 167 Misc. 545, 4 N. Y. Supp. (2d) 130; *People* v. *Macner*, 171 Misc. 720, 13 N. Y. Supp. (2d) 451; (1939) 39 Col. L. Rev. 287; 6 *Wigmore on Evidence* (3d ed.), p. 395; 2 *Wharton's Criminal Evidence* (11th ed.), p. 1353.

[10] *Nardone* v. *United States*, 308 U. S. 338, 341–342; *Cox* v. *Vaught*, 52 F. (2d) 562 (C. C. A. 10th); *United States* v. *Price*, 163 Fed. 904 (S. D. N. Y.); *United States* v. *Jones*, 16 F. Supp. 135 (S. D. N. Y.); *In re Romine*, 138 Fed. 837 (N. D. W. Va.); *People ex rel. Lemon* v. *Supreme Court*, 245 N. Y. 24; *People* v. *Nields*, 70 Cal. App. 191, 232 Pac. 985; *People ex rel. Page* v. *Terte*, 324 Mo. 925, 25 S. W. (2d) 459; *People* v. *May*, 158 Misc. 488, 287 N. Y. Supp. 162; *people* v. *Gatti*, 167 Misc. 545, 4 N. Y. Supp. (2d) 130; 2 *Wharton's Criminal Evidence* (11th ed.), pp. 1353–1354.

or inspection will be ordered than would otherwise be the case.[11]

Applying these principles to the case at bar, we believe it clear that the District Court did not abuse its discretion in refusing to order production of the transcript of testimony. The burden was on the petitioner to satisfy the trial court as to the solidity of his claim and to establish that it was "sufficient to justify the trial court's indulgence of inquiry" (cf. *Nardone* v. *United States*, 308 U. S.

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[11] *McKinney* v. *United States*, 199 Fed. 25 (C. C. A. 8th); *Cox* v. *Vaught*, *supra*; *United States* v. *Perlman*, *supra*; *United States* v. *Herzig*, *supra*; *United States* v. *Oley*, *supra*; *United States* v. *Price*, *supra*; *United States* v. *Goldman*, 28 F. (2d) 424, 432 (D. Conn.); *People* v. *May*, *supra*; *cf. Metzler* v. *United States*, *supra*; see 2 Moore's *Federal Practice*, p. 2461, note 1.

The principles stated in the text are comparable to the rules applicable in civil cases under the Federal Rules of Civil Procedure. Rule 34 provides:

"Upon motion of any party *showing good cause therefor* and upon notice to all other parties, the court in which an action is pending *may* (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, *not privileged*, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; * * *." [Emphasis supplied.]

Only in a few jurisdictions, however, have the courts afforded an accused an opportunity for discovery and inspection which is comparable to that enjoyed by a party to a civil action. See 6 *Wigmore on Evidence* (3rd ed.), pp. 475–476; *People ex rel. Lemon* v. *Supreme Court*, 245 N. Y. 24; but cf. 2 *Wharton's Criminal Evidence* (11th ed.), p. 1352.

338, 342). That burden the petitioner entirely failed to sustain. Not only was his plea in the most general of terms, but he made no effort to offer other proof to establish his plea, although such other proof was readily available to him (see pp. 25–26, *supra*). The Government, on the other hand, filed an affidavit in opposition to the plea in which an attorney for the Securities and Exchange Commission, who had participated in all of the proceedings at which the petitioner had appeared, categorically stated that petitioner had not been compelled to testify or give information against himself, and that each of the proceedings had been recessed shortly after petitioner had interposed his plea of immunity. In view of this affidavit, which the District Court was clearly entitled to consider (*United States* v. *Jones*, 16 F. Supp. 135, 137 (S. D. N. Y.)), and of petitioner's failure to offer any contrary evidence, the action of the District Court appears to have been fully justified.

Furthermore, investigations conducted by the Securities and Exchange Commission are, as the Rules of the Commission recognize, necessarily secret and confidential in nature; they are analogous to grand jury proceedings. *Woolley* v. *United States*, 97 F. (2d) 258, 262 (C. C. A. 9th), certiorari denied, 305 U. S. 614; *Consolidated Mines of California* v. *Securities and Exchange Commission*, 97 F. (2d) 704, 708 (C. C. A. 9th); *In re Securities and Exchange Commission*, 14 F. Supp. 417 (S. D.

N. Y.), affirmed, 84 F. (2d) 316 (C C. A. 2d), reversed as moot, 299 U. S. 504.[12] To require the production of a transcript of the testimony taken during the course of such an investigation might, in many cases, require the Government to disclose its evidence against the defendant. This objection, it is true, does not apply to a transcript limited to the defendant's own testimony, yet the production of even such a transcript might be prejudicial in two respects: first, it might force the Government to reveal a part of its evidence against other persons involved in the investigation and to make public the fact that such other persons are being investi-

[12] The principles discussed in this section of the brief are derived to a large extent from decisions concerning grand jury minutes. Such minutes are, of course, secret and confidential. While the courts have power, in the exercise of their discretion, to grant motions calling for inspection of grand jury minutes, or may themselves examine the minutes, this power is rarely exercised and then only after an affirmative showing that the only evidence presented to the grand jury was incompetent or illegal, or that the evidence was presented in violation of the constitutional rights of the accused, or that the indictment was obtained as a result of corruption, fraud, or caprice. The following cases deal with the right to inspect grand jury minutes when there is a claim of immunity because of self-incrimination before the grand jury: *United States* v. *Kimball*, 117 Fed. 156 (S. D. N. Y.); *United States* v. *Price*, 163 Fed. 904 (S. D. N. Y.); *People* v. *Clifford*, 105 Colo. 316, 98 Pac. (2d) 272; *Murphy* v. *State*, 124 Wis. 635; *Havenor* v. *State*, 125 Wis. 444; *State ex rel. Robertson* v. *Steele*, 117 Minn. 384, 135 N. W. 1128; *People* v. *Maoner*, 171 Misc. 720, 13 N. Y. Supp. (2d) 151; *People* v. *Coyle*, 172 Misc. 593, 15 N. Y. Supp. (2d) 441; *cf. United States* v. *Wetmore*, 218 Fed. 227 (W. D. Pa.). The following cases deal with the right to inspect

gated; and second, it assures that the defendant's story at the trial will be the same as the story which he told at the investigation, thus minimizing the possibilities of impeachment. We do not urge, of course, that these considerations require the secrecy of the investigation to remain in all circumstances inviolate; we urge merely that they are factors to be weighed by the court in determining how its discretion shall be exercised. And when, as here, the application for a transcript of the testimony taken during such a secret investigation is based upon general allegations unsupported by proof, the refusal of the application cannot be deemed an abuse of discretion.

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minutes when there is a claim that illegally obtained evidence was used before the grand jury: *United States* v. *Jones*, 16 F. Supp. 135 (S. D. N. Y.); *United States* v. *Gouled*, 253 Fed. 242 (S. D. N. Y.); *United States* v. *Lydecker*, 275 Fed. 976 (W. D. N. Y.); *United States* v. *Rubin*, 214 Fed. 507 (D. Conn.); *United States* v. *Jones*, 69 Fed. 973, 978 (D. Nev.); *cf. United States* v. *Price*, 163 Fed. 904 (S. D. N. Y.). The following cases deal with the right to inspect minutes when there is a claim that the only evidence before the grand jury was insufficient or incompetent: *McKinney* v. *United States*, 199 Fed. 25 (C. C. A. 8th); *Cox* v. *Vaught*, 52 F. (2d) 562 (C. C. A. 10th); *Kastel* v. *United States*, 23 F. (2d) 156 (C. C. A. 2d); *United States* v. *Violon*, 173 Fed. 501 (S. D. N. Y.); *United States* v. *Perlmun*, 247 Fed. 158 (S. D. N. Y.); *United States* v. *Garsson*, 291 Fed. 646 (S. D. N. Y.); *United States* v. *Herzig*, 26 F. (2d) 487 (S. D. N. Y.); *United States* v. *Oley*, 21 F. Supp. 281 (E. D. N. Y.); *United States* v. *Cobban*, 127 Fed. 713 (D. Mont.); *United States* v. *Silverthorne*, 265 Fed. 853 (W. D. N. Y.); *United States* v. *Goldman*, 28 F. (2d) 424, 431 (D. Conn.); *cf. Metzler* v. *United States*, 64 F. (2d) 203 (C. C. A. 9th).

Despite the foregoing considerations, we believe that, in cases where the plea states facts sufficient, if proved, to establish the defendant's immunity, the better practice is for the District Court itself to examine the transcript of the testimony without, however, ordering its submission to the defendant.[13] The propriety of this course has been indicated in several cases involving grand jury minutes. *United States* v. *Kimball*, 117 Fed. 156 (S. D. N. Y.); *United States* v. *Perlman*, 247 Fed. 158 (S. D. N. Y.); *United States* v. *Gouled*, 253 Fed. 242 (S. D. N. Y); *United States* v. *Silverthorne*, 265 Fed. 853 (W. D. N. Y.). However, in no case that we have found has it been held or even intimated that the trial court is under a mandatory obligation to adopt this practice; to the contrary, almost all of the decisions emphasize that the matter is one for the discretion of the trial judge. See cases cited in note 9, p. 29, *supra*. We submit, therefore, that irrespective of what the better practice might have been had the plea here been sufficient on its face, failure to follow that practice in the circumstances of this case cannot be held to be an abuse of discretion.

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[13] At the hearing before the District Court, the Government offered to introduce the transcripts in evidence if the court desired to examine them (R. 52–53).

Finally, it should be noted that, even if the refusal of the District Court to inspect the transcripts be considered error, the error was plainly not prejudicial. Examination of the transcripts would simply have confirmed the insubstantiality of petitioner's plea in bar and would necessarily have resulted in the overruling of that plea. For the reasons stated in the next succeeding section of this brief, we believe that the fact that the transcripts were not made part of the record before the District Court did not preclude the court below, and does not preclude this Court, from looking at the transcripts for the purpose of determining whether or not the failure of the District Court to inspect them, if error, was prejudicial error.

## IV

### THE ACTION OF THE COURT BELOW IN RECEIVING AND FILING THE GOVERNMENT'S AFFIDAVIT AND THE TRANSCRIPTS OF TESTIMONY DID NOT CONSTITUTE REVERSIBLE ERROR

As pointed out in the Statement (*supra*, p. 10), petitioner's brief in the court below in effect invited the Government to show the Circuit Court of Appeals the transcripts of his testimony before the Securities and Exchange Commission. Thereafter, when the case came on for argument before the Circuit Court of Appeals, the Government presented those transcripts to the court, together with an affidavit executed by an Assistant United States

Attorney, stating that at the hearing before the District Court the Government had offered to introduce the transcripts in evidence if the court desired to examine them, but that the District Judge had stated that he did not need them in order to pass upon the plea (R. 52–53). Over petitioner's objection, the affidavit and transcripts were received and filed by the court below (R. 52). This action petitioner alleges to have been error.

Even if we assume that the court below did err in this regard, the error was clearly not prejudicial. For the reasons already stated, the record, apart from the transcripts, establishes that the District Court properly overruled the plea in bar. Consequently, irrespective of the transcripts, the Circuit Court of Appeals was required to affirm its action. Affirmance being in any event required, the fact that the court may have erroneously relied for its decision upon papers improperly received cannot be considered reversible error any more than if the court had used erroneous reasoning to reach a correct result. But beyond this, the opinion rendered by the court below indicates quite clearly that its decision was in no way predicated upon the affidavit and transcripts. Accordingly, even if petitioner could establish that they were improperly received and filed, there would be no occasion for reversal and remand.

In our view, however, the action of the Circuit Court of Appeals in the circumstances of this case

was entirely proper. We do not urge, of course, that a federal appellate court may receive evidence, not in the record before the District Court, on the merits of the question before it. But that is not this case. The only possible error of the District Court here was in not looking at the transcripts itself; even if this were error, reversal would have been called for only if the error were prejudicial. And it is on the question of prejudice that we believe that the Circuit Court of Appeals could, and this Court can, properly examine the transcripts. This question does not depend on issues of fact determinable in the first instance by the trial court; the Circuit Court of Appeals and this Court are plainly as competent as the District Court to determine that, on their face, the transcripts furnish no support for petitioner's plea. In these circumstances, there is no reason in principle or precedent why the Circuit Court of Appeals should not itself have examined the transcripts instead of remanding the case for the District Court to examine them. On the contrary, such a remand would have been a purely formal and useless gesture, since it was manifest that, after its examination, the District Court would have had to take the same action with respect to the plea as it took before.

Persuasive authority in support of our position is furnished by the many decisions holding that, even though a trial court has erred in refusing to

permit the introduction of certain documents or testimony, the appellate court will not reverse and remand if, upon examination of the proffered documents or testimony, it clearly appears that their admission into evidence would not have affected the result.[14] In that type of situation, as here, the appellate court examines a document not considered by the District Court in order to determine whether or not the failure of the District Court to consider it was prejudicial error. The only distinction between that situation and this is that there the rejected document is normally marked for identification in the District Court and thus is part of the record certified by the District Court to the Circuit Court of Appeals; while here the document is not part of the record so certified. This distinction, however, is purely formal and in no way affects the substantive rights of the parties. And the practice followed in this case may be the necessary procedure in cases where the document is confidential and where, as here, the District Court declines to examine it.

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[14] See, e. g., *Hanover Fire Ins. Co.* v. *Merchants Transport Co.*, 15 F. (2d) 946 (C. C. A. 9th); *Corrigan* v. *United States*, 82 F. (2d) 106, 109 (C. C. A. 9th); *Parker* v. *The Gulf Refining Co.*, 80 F. (2d) 795 (C. C. A. 6th); *Aetna Life Ins. Co.* v. *McAdoo*, 106 F. (2d) 618, 621 (C. C. A. 8th); *United States* v. *Marsh*, 108 F. (2d) 558 (C. C. A. 4th); *Grand Valley Water Users Ass'n* v. *Zumbrunn*, 272 Fed. 943, 947 (C. C. A. 8th); *Kern* v. *United States*, 169 Fed. 617 (C. C. A. 6th).

Petitioner attempts to meet the force of this position by urging that the reception of the transcripts by the Circuit Court of Appeals denied him the right of cross-examination as to their authenticity and correctness (Br. 43). As we have pointed out, however, the most that petitioner would have been entitled to in the District Court would have been for the court itself to examine the transcripts; had the District Court followed that practice, the petitioner would likewise have had no right of cross-examination. But even apart from this, the right of cross-examination would have been of no avail to petitioner. At best, he could have established by cross-examination that the transcripts were not authentic or not correct and that they were therefore of no probative value. Had he established this, he would have been back in precisely the same position as he was actually in before the District Court, with a plea in bar entirely unsupported by proof.

## V

### THE ACTION OF THE COURT BELOW IN BASING ITS AFFIRMANCE OF THE JUDGMENT OF CONVICTION UPON THE VALIDITY OF THE CONSPIRACY COUNT, WHICH ALONE DOES NOT SUPPORT A THREE-YEAR SENTENCE, DOES NOT CONSTITUTE REVERSIBLE ERROR

The court below pointed out in its opinion (R. 72) the established rule that where there is a general verdict or finding of guilt on an indictment

containing several counts and the sentences on each count are to run concurrently, the judgment will be sustained on appeal if any count sufficient to support the sentence is valid, irrespective of the validity of the other counts. *Brooks* v. *United States,* 267 U. S. 432, 441; *Pierce v. United States,* 252 U. S. 239, 252; *Abrams v. United States,* 250 U. S. 616, 619; *Claassen* v. *United States,* 142 U. S. 140. The court then proceeded to examine in its opinion the objections raised by petitioner to the eleventh, or conspiracy, count of the indictment and, finding them to be without merit, affirmed the judgment of conviction. In so doing, the court below apparently failed to recognize that, while the District Court had imposed a three year sentence for each count in the indictment, the maximum sentence provided by statute for the offense of conspiracy is two years. Criminal Code, Sec. 37, 18 U. S. C. § 88.

This oversight on the part of the court below, however, plainly does not constitute reversible error, since, contrary to the statement in its opinion (R. 72), the grounds upon which the petitioner attacked the conspiracy count include all the objections which he raised which are applicable to counts four and five of the indictment, each of which counts is sufficient to support the three year sentence. The "Statement of Points Relied On" filed by the petitioner in the court below appears in the record at pages 1–3. In this Statement of Points

petitioner sets forth his objections to the validity of the indictment in eight separate paragraphs. Two of these ((a) and (b)) relate to the indictment as a whole, including the conspiracy count as well as counts four and five; two ((e) and (g)) relate only to counts three, six, seven, eight, nine, and ten; one ((f)) relates specifically to counts four and five, but in a later paragraph ((h)), the same objections are specifically raised to the conspiracy count; and only two paragraphs ((c) and (d)) contain objections which are in terms directed to counts four and five, as well as to the other substantive counts, and which are not also raised in connection with the conspiracy count. The objections raised in these paragraphs (c) and (d), however, are plainly inapplicable to counts four and five. They charge that all the substantive counts are fatally defective because of duplicity and because they do not properly allege that the representations made by the defendant were false. Counts four and five, however, are not based upon false representations but simply upon the sale of securities at a time when no effective registration statement covering those securities was on file with the Securities and Exchange Commission. And since each of these counts relates only to the sale, and delivery after sale, of a single security, the objection of duplicity clearly does not apply to them.

It is manifest, therefore, that in passing upon the objections which petitioner raised to the con-

spiracy count, the court below likewise passed upon all the applicable objections to counts four and five. Under these circumstances, there is, of course, no occasion for this Court to remand the case to the Circuit Court of Appeals for further consideration of the validity of the indictment. To the contrary, in view of the insubstantial, if not capricious, nature of the objections raised by the petitioner to counts four and five, as well as to the other substantive counts, affirmance of the decision below is clearly required. Cf. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 567–568.

## VI

### THE INDICTMENT IS VALID

Petitioner contends that the whole indictment is invalid because it was endorsed by Ernest W. Clarke as "Foreman" rather than as "Foreman of the Grand Jury" (Br. 24–27); that counts 4, 5, and 11 are invalid because they fail to allege that the securities sold by petitioner were not of a class exempted from registration by the Rules and Regulations of the Securities and Exchange Commission (Br. 29–35, 39); that counts 1 and 2 are invalid because they fail properly to allege that the misrepresentations charged to petitioner were false (Br. 27); that count 3 is invalid because it fails to state in what respects the facts which petitioner allegedly omitted to state are material (Br. 28–29); and that counts 6 to 10 are invalid because the mail

fraud statute upon which they are based has been repealed by the Securities Act of 1933. None of these objections has merit.

1. The indictment was signed by John Brett, Assistant United States Attorney, and endorsed as follows: "A true bill. Ernest W. Clarke, Foreman" (R. 29). Petitioner urges that the endorsement should have read "Ernest W. Clarke, Foreman of the Grand Jury." But the authorities which he cites in no way sustain his position; although, as the court below pointed out (R. 72–73), it would have been better practice to add the words "of the Grand Jury" after the word "Foreman," this was not essential to the validity of the indictment. *United States* v. *Plumer,* 27 Fed. Cas. No. 16,056; *State* v. *Valere,* 39 La. Ann. 1060, 3 So. 186; *State* v. *Patterson,* 150 La. 114, 90 So. 532; *State* v. *Gilson,* 114 Mo. App. 652, 90 S. W. 400; *Hall* v. *Commonwealth,* 143 Va. 554, 130 S. E. 416.

2. The objection that counts 4, 5 and 11 are defective because of failure to charge that the securities sold were not of a class exempted from registration under the Rules and Regulations of the Securities and Exchange Commission is likewise without substance. With respect to this contention, the court below stated (R. 71–72):

> [Section 3 of the Securities Act, as amended] provides that the provisions of the title shall not apply to the classes of

> securities described therein, and that the commission may from time to time add other classes to the exempted categories. The effect of the statute is to except from the scope and operative effect of the title the described classes of securities and others which may be added by the commission. It is clear from the face of the count that the securities described therein do not come within the classes described in the statute. Ordinarily an exception created by a proviso or other distinct or substantive clause of a criminal statute need not be negatived in an indictment. One relying upon such an exception must set it up and establish it * * *.

The ruling of the court below in this respect is fully supported by authority. *McKelvey* v. *United States,* 260 U. S. 353, 356–357; *Schlemmer* v. *Buffalo, Rochester, etc. Ry.,* 205 U. S. 1, 10; *Nicoli* v. *Briggs,* 83 F. (2d) 375 (C. C. A. 10th) and cases cited; cf. *Ledbetter* v. *United States,* 170 U. S. 606.

3. No discussion whatever is needed with regard to the objections raised by petitioner to the sufficiency of the allegations contained in counts 1, 2, and 3; a mere reading of those counts demonstrates the frivolous nature of petitioner's position.

4. Equally frivolous is the contention that the mail fraud statute (Criminal Code, Sec. 215, 18 U. S. C. § 338), which forms the basis of counts 6 to 10, inclusive, has been repealed by the Securities Act of 1933. This contention has several times

been rejected by the lower federal courts. *United States* v. *Rollnick,* 91 F. (2d) 911 (C. C. A. 2d); *United States* v. *Montgomery,* 21 F. Supp. 770 (D. N. Mex.); *United States* v. *Alluay,* 13 F. Supp. 289 (N. D. Tex.).

## VII

### THE THREE-YEAR SENTENCE IMPOSED BY THE DISTRICT COURT ON THE CONSPIRACY COUNT MAY BE CORRECTED BY THIS COURT

The District Court committed error in imposing a three-year sentence on the conspiracy count, for which the maximum sentence provided by statute is two years (Criminal Code, Sec. 37, 18 U. S. C. § 88). This error, of course, is not material, since the three-year sentence may, as we have shown, be sustained on any one of the substantive counts. However, should the petitioner desire a correction of the judgment in this respect, this Court may either correct the sentence in its mandate by reducing the term of imprisonment on the conspiracy count from three years to the maximum statutory limit of two years or may remand the case to the District Court with directions to make this correction. *Blitz* v. *United States,* 153 U. S. 308, 318; *Salazar* v. *United States,* 236 Fed. 541 (C. C. A. 8th); *D'Allessandro* v. *United States,* 90 F. (2d) 640 (C. C. A. 3d); *Spirou* v. *United States,* 24 F. (2d) 796 (C. C. A. 2d), certiorari denied, 277 U. S. 596; *Prioi* v. *United States,* 6 F. (2d) 575 (C. C. A. 6th); *Jackson* v. *United States,* 102 Fed. 473 (C. C. A. 9th).

## CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted.

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FEBRUARY 1941.

# APPENDIX

## STATUTES AND RULES INVOLVED

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88):

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 215 of the Criminal Code (U. S. C., Title 18, Sec. 338):

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement * * * in any post office, or station thereof * * * to be sent or delivered by the post-office establishment of the United States * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

Section 17 (a) of the Securities Act of 1933 (U. S. C., Title 15, Sec. 77q):

> (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or * * *
>
> * * * * * *

Section 5 (a) of the Securities Act of 1933, as amended (U. S. C., Title 15, Sec. 77e):

> (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.
>
> * * * * * *

Section 3 of the Securities Act of 1933, as amended (U. S. C., Title 15, Sec. 77c) so far as pertinent,

(a) Except as hereinafter expressly provided, the provisions of this sub-chapter shall not apply to any of the following classes of securities;

(Then follows the various classes of securities which are exempt.)

(b) The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this subchapter with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $100,000.

Section 24 of the Securities Act of 1933 (U. S. C., Title 15, Sec. 77x):

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

Rule IV [1] of the Rules of Practice promulgated by the Securities and Exchange Commission:

* * * * *

> (c) Hearings shall be stenographically reported and a transcript thereof shall be made which shall be a part of the record of the proceeding. Transcripts will be supplied to the parties by the official reporter at such rates as may be fixed by contract between the Commission and the reporter.

Rule XVI [2] of the Rules of Practice promulgated by the Securities and Exchange Commission:

> These Rules shall not be applicable to investigations conducted by the Commission pursuant to Sections 8 (e), 19 (b), and 20 (a) of the Securities Act of 1933, as amended; Sections 21 (a) and 21 (b) of the Securities Exchange Act of 1934, as amended; or Sections 11 (a), 13 (g), 18 (a), 18 (b), 18 (c), and 30 of the Public Utility Holding Company Act of 1935.

Rule 200 of the General Rules and Regulations promulgated by the Securities and Exchange Commission under the Securities Act of 1933, as it was in effect at the time of the transactions alleged in counts four and five:

> Subject to the conditions stated in this rule, the following securities are added, pur-

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[1] Rule IV of the Rules of Practice, as amended November 4, 1936, is now contained in substance in Rule V (c) of the Rules of Practice, as amended December 1, 1939.

[2] Rule XVI of the Rules of Practice, as amended November 4, 1936, is now contained in substance in Rule XIX of the Rules of Practice, as amended December 1, 1939.

suant to section 3 (b) of the Act, to the classes of securities exempted as provided in section 3 (a) of the Act:

Any securities (other than those specified below) upon the condition that the aggregate offering price to the public shall not exceed the sum of $30,000. *Provided, however,* that the amount of the offering shall be reduced by the amount of any other offerings (whether public or private), within one year prior to the offering herein exempted, of securities of the same issuer, or of any person controlling, controlled by, or under common control with such issuer, unless, or except to the extent that, such offerings have been withdrawn or have comprised securities (a) such as are described in section 3 (a) (3) of the Act or (b) issued in connection with the liquidation or the purchase or pledge of the assets of any national banking association and to which the provisions of title I of the Act do not apply by reason of any of the provisions of subsection (a) of section 3 thereof. The aggregate offering price of securities offered at the market shall be taken as the product of the number of units offered multiplied by the price per unit at which the securities were bona fide sold on the first day of sale. The aggregate offering price of any securities exchanged for bona fide outstanding securities or claims shall be determined as provided in rule 205.

This rule shall not be applicable to exempt (1) certificates of deposit, except certificates of deposit or receipts issued pursuant to a plan and/or agreement under which such certificates of deposit or receipts are to be exchanged for bonds issued by the Home Owners' Loan Corporation and/or the net

cash proceeds thereof; (2) securities exchanged for bona fide outstanding securities or claims; (3) voting trust certificates; or (4) overriding royalty interests, oil and/or gas payments, or fractional undivided interests in oil, gas, or other mineral rights.

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# SUPREME COURT OF THE UNITED STATES.

No. 377.—October Term, 1940.

Hiram R. Edwards, Petitioner, vs. The United States of America. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[March 3, 1941.]

Mr. Justice Reed delivered the opinion of the Court.

This case is here upon affirmance by the Circuit Court of Appeals of a sentence imposed after a plea of nolo contendere.[1] We granted certiorari because there were involved certain important questions of criminal procedure, especially with respect to a plea in bar filed by petitioner. That plea claimed immunity from prosecution because of prior incriminating testimony given under compulsion by the petitioner at an investigation conducted by the Securities and Exchange Commission.

The indictment against petitioner, in eleven counts, arose out of an alleged fraudulent scheme for selling interests, created by him as a part of the device, in various oil and gas leases in Oklahoma and Texas. The first three counts charged violations of the fraud provisions of the Securities Act, 15 U. S. C. § 77q(a); the fourth and fifth, violations of the registration provisions of that Act, 15 U. S. C. § 77e; counts six to ten, violations of the mail fraud statute, 18 U. S. C. § 338; and the eleventh count, a conspiracy to commit the offenses previously set forth.

On December 16, 1938, petitioner filed a demurrer, attacking the legal sufficiency of the indictment on a number of grounds. At the same time he filed a "Plea in Bar and Application for Production of Transcript of Evidence." The substance of this plea was the following: That on April 14, 1938, and two successive dates, pursuant to subpoenas duces tecum, petitioner had appeared before an officer of the Securities and Exchange Commission with the books and records called for, and

"after having claimed his immunity against self incrimination, as provided by law and the Constitution of the United States, under

[1] 113 F. (2d) 286.

compulsion, testified under oath, pursuant to various questions propounded and asked him by said officer of said Commission, said testimony concerning said defendant's identity and relationship to various trusts and organizations which are the subject matter of this prosecution and concerning divers and sundry other matters pertaining to the matters which are the subject of this prosecution, and particularly to the personal entries, books and records of said defendant, which are a part of the subject matter of this prosecution."

The pleading goes on to state, upon information and belief, that the evidence adduced by the Commission in the course of its investigation was transmitted to the Attorney General for criminal prosecution; that petitioner was compelled to give information and testimony "which it is believed the Government will use against him in the prosecution herein"; and that petitioner was accordingly immune from prosecution under Section 22(c) of the Securities Act.[2] Petitioner further set forth that at the time of the Commission hearings he had demanded a copy of the transcript of his testimony, offering to pay the cost thereof, but that the request had been refused; that on December 1, 1938, he had made a similar request, which also had been refused, as evidenced by an attached letter from the assistant general counsel of the Commission.[3] Petitioner renewed his demand and tender of payment, asserting that it was necessary for him to have the transcript in

[2] 15 U. S. C. § 77*v*(c): "No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

[3] In part, the letter read:

"Inasmuch as the evidence adduced by the Commission in the course of its investigation was transmitted to the Attorney General for criminal prosecution and an indictment has been returned, this Commission does not feel it proper to make available to the defendant the testimony taken from witnesses which may be used by the Government in the prosecution of its case. In view of this, the Commission must respectfully refuse to comply with your request. The United States Attorney concurs in this view."

the presentation to the court of his plea in bar, and that it was necessary for the court to have it before passing on the plea. The pleading concludes by praying the court to order that the transcript be furnished petitioner and that he be heard on the merits of this plea in bar.

On February 28, 1939, the Government filed a pleading called a "Motion to Strike Plea in Bar and Objection to Production of Transcript of Evidence." This attacked the sufficiency of the plea in bar on its face in three different respects, and also alleged in the nature of an answer that petitioner

"was never sworn at any time during the proceedings or hearings complained of and at no time produced any books or records, and did not at any time testify under oath, and was never compelled to testify or give any information against himself or anyone else under oath or otherwise and that each of said hearings complained of was recessed shortly after the defendant interposed his plea of immunity."

In support of this last allegation the Government attached an affidavit of an attorney of the Securities and Exchange Commission who had been present on all three occasions when the petitioner claimed to have given incriminating testimony under compulsion.

Petitioner moved to strike this affidavit of the Commission attorney on the ground that it deprived him of his right to cross-examination and that it was "wholly incompetent to establish the facts attempting to be established."

The District Court overruled petitioner's demurrer to the indictment, his plea in bar and application for the transcript, and also his motion to strike the affidavit of the Commission attorney. An affidavit later filed by the Government in the Circuit Court of Appeals shows that at this hearing on petitioner's plea in bar

"counsel for the government of the United States stated to the Court that they had the transcripts of the record in the proceedings . . . and if the government's affidavit was not sufficient, the government would offer them in evidence if the Court desired to examine them; that upon being so advised, His Honor, Judge Vaught, stated that he did not care to see the transcripts, that he did not need them to pass upon the said plea in bar, and that he was going to overrule the defendant's plea in bar."

The Government's motion to strike the plea in bar was overruled, also. Subsequently petitioner withdrew his original plea of not

guilty,[4] and entered a plea of nolo contendere. The District Court sentenced him to three years on each count, the terms to run concurrently. On appeal petitioner assigned as error the action of the District Court in overruling his demurrer and plea.

When the case was argued before the Circuit Court of Appeals the Government submitted, over petitioner's objection, a copy of what it said was a transcript of petitioner's testimony before the Securities and Exchange Commission, supported by an affidavit of the assistant United States attorney in charge of this prosecution. The transcript was offered to buttress the Government's contention that petitioner had in fact given no testimony of an incriminating nature, but the Circuit Court of Appeals did not rest its affirmance even in part upon the contents of the transcript.

The court affirmed because the plea in bar did not allege that the claim of immunity was made in a "hearing" of the Commission as distinguished from an "investigation" and because no evidence was produced by petitioner in support of his plea. As to the demurrer to the indictment, the Circuit Court of Appeals found no error in omitting from the conspiracy count allegations that the classes of securities involved in the alleged frauds were not in the excepted categories of securities in section three of the Securities Act. This was the sole ground of petitioner's attack on the conspiracy count. In the belief that a sentence on this count, to run concurrently with equal sentences on the other counts, made it unnecessary to examine the other counts,[5] the court did not examine the sufficiency of the other counts.

Petitioner urges as grounds for our reversal of the judgment below the errors in overruling his plea in bar and demurrer, in affirming a sentence of three years on the conspiracy count of the indictment without examination of the other counts, and in receiving the transcript of testimony before the Commission and accompanying affidavit as evidence.

*Plea in Bar.* The Government challenges the sufficiency of the plea in bar to show petitioner's claim to the benefit of the amnesty of Section 22(c). It suggests that the excerpt set out in the third paragraph of this opinion shows only that testimony was given

[4] Petitioner had pleaded not guilty on December 17, 1938.

[5] Claassen *v.* United States, 142 U. S. 140; Gorin *v.* United States, 312 U. S. —.

concerning "defendant's identity and relationship" to the organizations whose securities the indictment charges defendant fraudulently sold; that "other matters" testified to are not specified nor the "nature" of the testimony concerning them or his personal records. But the allegations of the plea are not to be weighed separately. Petitioner's identity and his relationship to the trusts alleged to have been created by him as a part of the fraudulent scheme are of primary importance in the proof of his criminality. This is quite different from the testimony in *Heike* v. *United States*,[6] a prosecution for fraud on the revenue in weighing imported sugar. There former testimony in a Sherman Act proceeding related to official connection with a company involved and also a table showing the amount of sugar handled by the company, and a claim for amnesty was denied because the evidence "neither led nor could have led to a discovery of his crime." Certainly had petitioner given evidence of his creation of the organizations which the indictment says were part of his artifice it might easily have led to discovery of his trickery. It seems, too, that at least some of the other matters were specified, to wit: the personal entries, books and records of petitioner. Likewise the nature of his alleged testimony concerning his records is sufficiently related to the indictment by saying they are a part of the subject matter of this prosecution. The plea is good on its face.

It is next urged that the plea was properly overruled because of petitioner's failure to prove its allegations.[7] Such result is assumed to follow on the theory that as the burden was on petitioner to prove his plea, the failure of the record to show an offer of proof justifies the order. As appears from the preceding statement of the case, the trial court overruled not only the plea in bar but petitioner's motion for production of the transcript, which was certainly the best evidence of whether the testimony before the Commission was sufficiently related to the prosecution to support amnesty. In the *Martin* case,[8] this Court said the action dismissing a traversed motion for failure of proof would have been reversed if the opportunity to establish the facts by evidence had been denied the accused. Treating the Government's motion to strike the plea in bar

[6] 227 U. S. 131.

[7] Cf. Nardone *v.* United States, 308 U. S. 338, 341; Martin *v.* Texas, 200 U. S. 316, 319; Mamaux *v.* United States, 264 Fed. 816, 819.

[8] *Supra*, note 7.

as a traverse of that pleading which would justify the order overruling it in the absence of a showing in the record of an offer of proof, that result does not follow where, as here, the plea is accompanied by a motion for the production of the transcript of the former evidence. The plea and motion showed that application had previously been made to the Securities and Exchange Commission for the transcript and had been refused.

We assume that the proceeding in which the former testimony was given was a private and confidential investigation of the Commission rather than a hearing which might eventuate in an order.[9] The Commission's refusal to produce the record indicates that the request had been for a complete transcript of the hearing. It rests in the discretion of the trial court to issue an order to show cause why the complete transcript should not be produced, if it deems all of it necessary, or only so much as may fairly make it appear whether the testimony of petitioner before the Commission was a proper foundation for the amnesty claimed. This is not an instance of the inspection of notes or material gathered by a prosecutor for his own use.[10] What is sought is the production as evidence in the hearing on the plea in bar of the very foundation of the plea. We find nothing in this record to indicate the desirability of secrecy so far as the testimony of petitioner is concerned. The Government introduced in the Court of Appeals a purported transcript of petitioner's former testimony without asserting its confidential character then or in the motion and traverse below.

Finally the Government contends that the refusal to order the production of the testimony was not prejudicial. This argument presupposes that the offer to produce in the trial court and the actual production in the Circuit Court of Appeals was adequate. Otherwise we cannot know what the testimony was which is relied upon for the amnesty. We think that neither offer was an adequate proffer. In neither instance was the petitioner given an opportunity to cross-examine; no witness produced the transcript; it was not certified as a part of the record from the trial court or as a

[9] Cf. In re Securities and Exchange Commission, 14 F. Supp. 417, 418; 84 F. (2d) 316; reversed as moot, 299 U. S. 504.

[10] People *ex rel.* Lemon *v.* Supreme Court, 245 N. Y. 24; cf. Rex *v.* Holland, 4 T. R. (Durnford & East) 691.

part of the records of the agency.[11] The record certified to the Circuit Court of Appeals is the record on which the appeal is to be heard. Criminal Appeals Rules VIII and IX.

The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions or else the impression of the judge arising from sources outside the record dominates results. The requirement that allegations must be supported by evidence tested by cross-examination protects against falsehood. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden.[12]

*Other Objections.* As the case must be remanded, petitioner's objection to the three-year sentence on the conspiracy count is sustained without discussion. Criminal Code, section 37; 18 U. S. C. § 88. Frivolous objection is made to the indictment because it is endorsed "A true bill, Ernest W. Clarke, Foreman" instead of Foreman of the grand jury. This contention is rejected.

Petitioner brings here for review his demurrer to the indictment and each count thereof. The Circuit Court of Appeals found the conspiracy count sufficient against an attack that in charging a conspiracy to violate the Securities Act of 1933 by selling unregistered securities, the count failed to charge that the securities so sold were not of the class exempted from registration under section three of the Act and the rules and regulations thereunder. With this ruling we agree.[13] As the sentence under count eleven, the conspiracy count, was for as long a time as any of the other counts upon which concurrent sentences had been imposed, the Circuit Court of Appeals did not review the alleged deficiencies of the other counts.

Counts four and five are charged with the same fault as eleven. For a like reason we hold them good. Counts one and two describe the scheme to defraud and allege instances of the use of the mails.

[11] Cf. R. S. § 882, as amended, 48 Stat. 1109.

[12] Cf. Walker *v.* Johnston, 312 U. S. —.

[13] McKelvey *v.* United States, 260 U. S. 353, 357.

The brief of petitioner fails to raise any question deserving consideration as to their sufficiency and we see none. Petitioner challenges count three for failure to state the materiality of facts which the count charges were omitted, although they were required to be stated to avoid misleading purchasers.[14] But the count, after describing various ommitted facts by paragraphs, ends such paragraphs with the allegation

"such fact being well known to said defendants and each of them at all times herein mentioned, and such fact being material in order to make the statements made by said defendants, in the light of the circumstances under which they were made, not misleading . . . ."

The facts alleged were obviously material. Counts six to ten inclusive are based upon the mail fraud statute.[15] Petitioner's objection to these counts is that a later act, the Securities Act of 1933, makes it unlawful to use the mails to defraud by the sale of securities. His argument is that in so far as the later act prohibits the fraudulent sale of securities by mail, it repeals by implication the provisions of the old mail fraud statute in so far as they cover securities. We see no basis for a conclusion that Congress intended to repeal the earlier statute. The two can exist and be useful, side by side.[16]

*Reversed.*

Mr. Justice DOUGLAS took no part in the consideration or decision of this case.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

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[14] Section 17(a)(2), Securities Act of 1933; 15 U. S. C. 77q(a)(2).

[15] Criminal Code, section 215; 18 U. S. C. § 338.

[16] Cf. United States *v.* Rollnick, 91 F. (2d) 911, 918; United States *v.* Montgomery, 21 F. Supp. 770; United States *v.* Allman, 13 F. Supp. 289.

END